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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1114~~ 2111

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Schwing Motor Company, Incorporated, prays that a Writ of Certiorari issue to review the Judgment entered in this case on January 25, 1957 by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 239 F. 2d 176.[1] The Opinion of the United States District Court for the District of Maryland is reported at 138 F. Supp. 899.[2]

[1] Appended to the Petition is a copy of this *per curiam* opinion.
[2] See Appellants' Appendix, pp. 15-29.

JURISDICTION

The Judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Fourth Circuit on January 25, 1957.

The Judgment was entered on January 25, 1957 after a Petition for a Rehearing had been denied by the United States Court of Appeals for the Fourth Circuit on January 25, 1957. Mr. Chief Justice Warren signed an Order on April 16, 1957 granting an extension of time within which to petition for certiorari to and including June 24, 1957.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The case in the District Court arose on the Motion of the Defendants to Dismiss the Amended Complaint because it failed to state a claim upon which relief could be granted. The Amended Complaint is a substantial document containing 15 printed pages (1-15),[3] alleging in some detail the conspiracy between Hudson Motor Car Company as the manufacturer, Hudson Sales Corporation as the distributing Corporation of the manufacturer, and Bankert Hudson, Inc., a local distributor of Hudson automobiles, parts and accessories in Baltimore City, Maryland, as well as Martin A. Bankert, Frank Burnham and Claude W. Margetts, to violate Section 1 of the Sherman Anti-Trust Act and also the creation of a virtual monopoly in Hudson automobiles, parts and accessories in Baltimore City and in the State of Maryland in violation of Section 2 of the Sherman Act. Sub-

[3] Figures in (....) refer to Appellant's Appendix in the Court of Appeals; where reference is made to the Appellees' Appendix in the Court of Appeals, the designation will be "(Appellees' App. ....)".

stantial injuries to the public are also alleged. The District Court, after argument, made certain assumptions of fact which were not alleged in the Amended Complaint and which were not stipulated or agreed to by the Petitioner, the dealer whose valuable business in the sale of new Hudson automobiles, parts and accessories was substantially destroyed as a result of the conspiracy. The Amended Complaint was dismissed without leave to amend.

A companion case, Belair Road Hudson, Inc., against the same Defendants was argued together in the District Court and was briefed and argued together in the United States Court of Appeals for the Fourth Circuit. The allegations in the Amended Complaint in this companion case are substantially the same as those in the present *Schwing* case, with minor differences which are unimportant so far as the ultimate decision of either case is concerned. The Belair Road Hudson case appeared as Civil Action No. 6363 in the District Court and No. 7221 in the United States Court of Appeals for the Fourth Circuit. The parties have stipulated in this latter case that whatever decision this Court makes in the *Schwing Motor Company* case will govern the *Belair Road Hudson* case also, so that it was not necessary to file a Petition for Certiorari in the companion case. In the *Schwing* case the Amended Complaint alleges single damages of $419,064.71 and claims three-fold damages in the amount of $1,257,194.13 together with costs and a reasonable attorneys' fee. In the *Belair Road Hudson* case, the single damages alleged are $717,698.16 with a claim for three-fold damages in the amount of $2,153,094.48, together with costs and a reasonable attorneys' fee.

The Petitioner in the present case and Belair Road Hudson, Inc. in the companion case, both elected jury trials. As indicated, the case was disposed of upon the allegations

of the Amended Complaint with the assumptions of fact made by the District Court, without testimony and without any stipulation.

In this posture of the case, the following questions are presented:

1. Did the Amended Complaint state a claim upon which relief could be granted for treble damages under Section 1 of the Sherman Act and Section 4 of the Clayton Act?

2. Did the Amended Complaint state a claim upon which relief could be granted for treble damages under Section 2 of the Sherman Act and Section 4 of the Clayton Act?

3. Does the action of the Court of Appeals in adopting the Opinion of the District Court and in approving the action of the District Court on the Motion to Dismiss the Amended Complaint, in making assumptions of fact not alleged in the Amended Complaint without testimony or a Stipulation of the parties, and in using such assumptions of fact to dismiss the Amended Complaint sanction an unwarranted and erroneous departure from the accepted and usual course of judicial proceedings?

The Petitioner maintains that all three questions should be answered in the affirmative.

STATUTES INVOLVED

1. Sections 1 and 2 of the Sherman Anti-Trust Act, Act of July 2, 1890, Chapter 647, Sections 1 and 2, 26 Stat. 209. 15 U.S.C. 1 and 2.

The relevant portions of these sections are as follows:

> SEC. 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *"
>
> SEC. 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations shall be deemed guilty of a misdemeanor. * * *"

Sections 1 and 2 are set forth verbatim in the Printed Appendix attached to this Brief. See Printed Appendix, page 57.

2. Section 4 of the *Clayton Anti-Trust Act*, Act of October 15, 1914, Chapter 323, Sec. 4, 38 Stat. 731, 15 U.S.C. 15. This Section provides as follows:

> SEC. 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The original Complaint was filed on January 16, 1953 in the United States District Court for the District of Maryland as Civil Action 6362 to recover treble damages under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act. A Motion to Dismiss the Complaint was granted on June 23, 1953 by the then Chief Judge Coleman with leave to file an amended complaint. The present Amended Complaint was filed on July 17, 1953 which all of

the Defendants (except Claude W. Margetts on whom service could not be made) moved to dismiss for alleged failure to state a claim on which relief could be granted.

The Amended Complaint (1-15) alleged the following:

A. *The Parties.*

1. The Plaintiff Below.

Schwing Motor Company, Incorporated, a Maryland Corporation (Schwing), was the Plaintiff Below: Schwing has its principal office and place of business at 3324-32 Keswick Road, Baltimore, Maryland.

2. The Defendants Below.

Prior to September 30, 1952, Schwing operated an agency or dealership for the sale of Hudson automobiles and Hudson automobile parts and accessories, manufactured by Hudson Motor Car Company, a Michigan Corporation (Hudson Motor). These automobiles, parts and accessories were shipped by the manufacturer to Schwing in interstate commerce. Hudson Sales Corporation (Hudson Sales), also a Michigan Corporation, is the wholly-owned subsidiary corporation of Hudson Motor, all of its officers are officers, employees or directors of Hudson Motor, and Hudson Sales acts as the Sales Department of Hudson Motor. It is completely dominated and controlled by Hudson Motor. Hudson Motor and Hudson Sales will be hereafter referred to as "Hudson". Bankert Hudson, Inc. (Bankert), is a Maryland Corporation with its principal place of business at Howard and 25th Streets, Baltimore, Maryland. Martin A. Bankert, is a Maryland citizen, is President of Bankert and is its dominating force. Frank Burnham (Burnham) is the Dealer Representative of Hudson in the Maryland area. Claude W. Margetts (Margetts) is a resident of Virginia, is the Manager of Hudson in the Maryland -- District of

Columbia area and has not yet been served with process (1-3).

B. *General allegations of the Claim.*

In Paragraph 5 of the Amended Complaint (3), it is alleged that:

> "The acts and conduct of the Defendants, hereinafter set forth, constitute a combination and conspiracy in restraint of trade and commerce in Hudson automobiles and Hudson automobile parts and accessories among the several states, the monopolizing of a part of said trade and commerce and a combination and conspiracy to attempt to monopolize the same."

C. *Background of the action.*

In the autumn of 1944, Vincent Schwing, who was at that time a Ford Associated Dealer, was approached by a Field Representative of Hudson and was requested to consider the establishment of a Hudson Agency in Baltimore City and surrounding territory. At that time, there was no effective Hudson representation in the Baltimore area. Schwing declined to enter into any contract unless he received an agreement that he would receive from Hudson, after Hudson began its post-war production program, an annual quota of 150 Hudson automobiles. This was agreed to by Hudson by a letter dated February 19, 1945 from Hudson Sales to Vincent Schwing.

Schwing, in accordance with the request of Hudson, between 1945 and 1950, purchased a used-car lot for $9,000.00, constructed a new show-room for Hudson automobiles for $52,066.23, improved adjoining property at the approximate cost of $18,200.00 and expended for advertising Hudson automobiles, parts and accessories $42,497.14. The individual operation of Vincent Schwing was taken over by

Schwing on April 1, 1948 with the approval of Hudson. Schwing continued to operate that business until notified by registered letter dated July 16, 1952 from Margetts that Hudson would decline to renew or extend the then current Master Dealer Sales Agreement which expired on September 30, 1952 and would decline to sign a new agreement, contrary to the custom and practice theretofore followed by Hudson.

Schwing from the inception of the relationship with Hudson, expanded the business and developed it into a substantial, well-established and profitable business. In 1951, Vincent Schwing, as President of Schwing, received a trip to White Sulphur Springs, Virginia and a plaque in recognition of Schwing's sales of "The Pacemaker" line in Hudson automobiles.

In March, 1951, without any prior consultation with or knowledge by Schwing, Bankert opened a dealership at its present location, which is approximately one mile from Schwing's place of business. Margetts, acting on behalf of Hudson, assured Schwing that the Hudson Master Dealership of Schwing would continue.

In July, 1951, Margetts, acting on behalf of Hudson, again assured Schwing at the time of Hudson renewal of Schwing's Master Dealership that Schwing was a most desirable dealer.

D. *Allegations of the violations of the Sherman Act* (5-6).

Beginning in the month of September, 1951 and continuing from day to day thereafter, the Defendants, with full knowledge of Schwing's contract, did knowingly and unlawfully combine, conspire, agree and have a tacit understanding, together with each other and with divers other

persons, (1) to restrain a part of the trade and commerce in Hudson automobiles, parts and accessories among the several states of the United States and did, in fact, restrain said trade and commerce, in violation of Section 1 of the Sherman Act and (2) to monopolize and to attempt to monopolize a part of the trade and commerce of Hudson automobiles, parts and accessories among the several states of the United States and did, in fact, monopolize and attempt to monopolize said trade and commerce in violation of Section 2 of the Sherman Act.

E. *Objects and purposes of the conspiracy to restrain interstate commerce and to monopolize.*

The objects and purposes of the combination and conspiracy (6-7) are—

1. To eliminate Schwing from competition with Bankert and to appropriate by Bankert the interstate business of Schwing in Hudson automobiles, parts and accessories.

2. To restrain and restrict interstate commerce of Hudson automobiles, parts and accessories and to create or attempt to create a monopoly thereof in the Baltimore area in Maryland, to the end that higher prices and higher profits might be obtained from the purchasing public in the Baltimore area and in the State of Maryland in connection with the sale of Hudson automobiles, parts and accessories.

3. To fix arbitrarily the prices of used Hudson automobiles offered as trade-in allowances upon the sales of new Hudson automobiles at prices lower than the true competitive price thereof and thus to obtain from the purchasing public in the Baltimore area of Maryland and in the State of Maryland a "higher acquisition" price (retail price of a new Hudson automobile less the used-Hudson trade-in

allowance) for new Hudson automobiles and to obtain an abnormally large non-competitive profit upon these trade-in allowances.

4. To monopolize the supplying of Hudson automobiles, parts, accessories and Hudson service to the public in Maryland and in the Baltimore area in particular in order to obtain higher prices and charges therefor from the public and to render to the public less efficient and less convenient service at such higher costs.

F. *Overt acts in connection with and in furtherance of the conspiracy to restrain and to monopolize.*

A number of overt acts are set forth in particularity in Paragraph 9 of the Amended Complaint (7-11) in furtherance of the unlawful objects and purposes of the conspiracy between September, 1951 and September 30, 1952. These may be briefly summarized as follows:

1. Margetts and Burnham, acting on behalf of Hudson, visited the premises of Schwing, on or about September 20, 1951, and without stating any reason, requested Schwing to resign as a Hudson Master Dealer, which Schwing refused to do.

2. Bankert circulated rumors among customers and patrons of Schwing, that Schwing would lose its franchise to sell Hudson automobiles, parts and accessories.

3. Burnham, in November, 1951, advised Schwing's credit agency, that Schwing would lose its franchise.

4. An employee of Hudson attempted to induce Schwing's Manager in charge of purchasing and distributing Hudson automobiles, parts and accessories, to get in touch with the General Manager of Bankert, and the Gen-

eral Manager of Bankert sought to induce Schwing's employee to leave his employment and enter Bankert's employment in a similar position.

5. Bankert induced Burnham and Margetts and Hudson to breach the contract between Schwing and Hudson by refusing to supply Schwing with its quota of new Hudson automobiles.

6. Hudson breached the quota contract by refusing to deliver to Schwing the quota agreed upon and by refusing to accept orders from Schwing as agreed although new automobiles were available for delivery to Schwing which Hudson, Burnham and Margetts knew but which they falsely represented and pretended to Schwing were not available for delivery.

7. Bankert induced Hudson to decline to renew the franchise of Schwing without any reason other than the unlawful conspiracy and combination and contrary to the uniform and continued practice and custom theretofore existing.

8. Hudson, Burnham and Margetts, notwithstanding Schwing's large investment for the particular benefit of Hudson, determined without any reason other than the unlawful conspiracy and combination to refuse to renew Schwing's franchise which, by its terms, otherwise expired on September 30, 1952, as had been the uniform practice and custom theretofore existing and which franchise but for the unlawful conspiracy and combination would have been renewed.

9. Hudson, Burnham and Margetts falsely represented and pretended that there was an alleged difficulty in financing new Hudson automobiles ordered by Schwing which Hudson was obligated by contract to send to Schwing and

Hudson continued to refuse to ship to Schwing these new Hudson automobiles properly ordered by Schwing even after the complete falsity of said representations and pretense was clearly demonstrated.

10. Burnham and Margetts, as well as one C. H. Calhoun, Division Manager of Hudson, acting on behalf of Hudson, stated to Vincent Schwing as President of Schwing that the franchise would not be renewed by Hudson for the express purpose and with the specific intent of eliminating the competition of Schwing from the operations of Bankert.

11. Burnham and Margetts, as agents of Hudson, stated to the President of Belair Road Hudson, Inc., that its franchise which would otherwise also expire on September 30, 1952, would likewise not be renewed for the express purpose and for the specific intent of eliminating the competition of Belair Road Hudson, Inc. from the operations of Bankert.

12. The Defendants under similar circumstances and for the same purposes and with the same general plan, induced the breach and breached the contract between Hudson and Belair Road Hudson, Inc., to the end that as the result of the elimination of the competition of Schwing and of Belair Road Hudson, Inc., Bankert subsequent to September 30, 1952, "had and has a virtual monopoly of the sale of new Hudson automobiles, Hudson parts and accessories in the City of Baltimore, State of Maryland."

13. Bankert since the establishment of its virtual monopoly has arbitrarily fixed the price of used Hudson automobiles offered as trade-in allowances upon the sales of new Hudson automobiles at prices lower than the true competitive prices thereof and has thus obtained from the purchasing public in the Baltimore area and in the State of

Maryland a higher "acquisition price" (retail price of a new Hudson automobile less the used-Hudson automobile trade-in allowance) for new Hudson automobiles and has obtained and is obtaining from the public an abnormally large non-competitive profit upon the trade-in allowances.

14. Bankert since the establishment of the virtual monopoly has substantially and abnormally increased the charges for supplying Hudson automobile parts and accessories and Hudson service and has rendered the public less efficient and less convenient service at a higher cost.

G. *Injuries to the public.*

In Paragraph 10 of the Amended Complaint (11-14), the injuries to the public as result of the combination and conspiracy and the establishment of the virtual monopoly are alleged in detail. They may be summarized as follows:

During 1952 fewer Hudson automobiles moved in interstate commerce into Maryland than would have moved had there been no such combination and conspiracy and in particular 74 new Hudsons did not move in interstate commerce into Maryland because Hudson refused to accept *orders* from Schwing for 150 new Hudsons in accordance with the quota contract but only delivered 36 new Hudsons. Schwing was able to obtain from other dealers not in competition with Bankert 40 additional new Hudsons during 1952, a total of 76 new Hudsons instead of 150 agreed upon, which but for the unlawful combination and conspiracy would have moved into Maryland in interstate commerce. Schwing believes that but for the conspiracy and combination, it could have sold many more than the 150 new Hudsons mentioned and these additional new Hudsons did not move in interstate commerce because of the conspiracy. At least 283 new Hudsons did not move in interstate com-

merce because of the operation of the same conspiracy upon Belair Road Hudson which had a contract for 500 new Hudson automobiles, and the Plaintiff believes that new Hudsons, in addition to the 500 agreed upon between Hudson and Belair Road Hudson would have moved in interstate commerce but for the unlawful combination and conspiracy.

From January 1, 1953 to May 31, 1953, as a direct result of the unlawful combination and conspiracy, registration of new Hudsons in Baltimore City declined approximately 36% as compared with the comparable period in 1952. This 36% decline is compared with a decline of less than 1% of registrations of new Hudsons in an average of 32 States (including Maryland) during the period May 31, 1952 to May 31, 1953. In the month of May, 1953, the decline in registrations in Maryland was 43% as compared with registrations in May, 1952 in Maryland. As a result of the unlawful conspiracy 95 new Hudsons have not been sold in Baltimore and in the State of Maryland which would have been sold together with larger numbers and which will not move in interstate commerce into Maryland.

Higher acquisition prices have been paid and will be paid to Bankert by the public.

Higher prices and charges have been made and are being made and collected by Bankert from the public for supplying Hudson parts, accessories and Hudson service, and this service is less efficiently performed and may only be obtained at a less convenient source than was the case prior to the consummation of the unlawful conspiracy and the establishment of the virtual monopoly.

The public has further been injured and damaged by being required and forced to purchase new Hudson auto-

mobiles, parts, accessories and "authorized" service from a less convenient source and from less efficient personnel than was the case prior to the consummation of the unlawful conspiracy and establishment of the virtual monopoly.

H. *Injuries to Schwing.*

As result of the unlawful conspiracy (15), the valuable and profitable business in the sale of new Hudsons, of Hudson parts and accessories and goodwill built up by Schwing during the past years at a large expenditure of money and much hard work has been substantially destroyed and the benefit of Schwing's investment and labor have been unlawfully monopolized and appropriated by Bankert to the great damage and injury to Schwing and to Schwing's property, and the quota contract between Schwing and Hudson has been breached in furtherance of the conspiracy and the Hudson dealer franchise was not renewed in accordance with the uniform practice and custom, as a result of all of which, damages and injuries have resulted to Schwing and to Schwing's property in the amount of $419,064.71.

Schwing claims that under Section 4 of the Sherman and Clayton Acts, 15 U.S.C. 15, three-fold damages of $1,257,194.13, with costs and a reasonable attorneys' fee, for all of which Schwing claims judgment.

The Amended Complaint was duly verified by Vincent Schwing as President of Schwing.

In the District Court's Opinion, there are references to alleged facts not appearing in the allegations of the Amended Complaint (20, 25). It is clear, however, that there was no Stipulation in regard to any purported facts not alleged in the Amended Complaint. See page 3 of Appellees' Appendix where it is stated in respect to the

District Court's inquiry as to whether certain facts were conceded: (Mr. Barnes) "No, Your Honor, we made no concession along that line. We are going to confine our proof entirely to the pleadings as set forth in the Amended Complaint."

Later in the Argument in this Petition, these unwarranted assumptions of fact will be particularly set forth. See pages 47-52 of this Petition.

REASONS FOR GRANTING THE WRIT

The Petition should be granted in this case because—

1. Important Federal questions involving the Anti-Trust Laws have been decided in conflict with the decisions of this Court, and with decisions of Courts of Appeal in several Circuits in that—

A. There was a failure to distinguish between the necessary allegations in regard to a Section 1 violation of the Sherman Act and a Section 2 violation of that Act.

(1) This failure is in conflict with the decision of this Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226; 60 S. Ct. 811, 846, 84 L. Ed. 1129, 1168-70 (see footnote No. 59) (1940, Douglas, J.).

(2) It is also in conflict with decisions in the First and Eighth Circuits. Compare:

Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F. 2d 96, 102 (CCA-1 — 1932, Wilson, Ct. J.);

White Bear Theatre Corp. v. State Theatre Corp., 129 F. 2d 600 (CCA-8, 1942 — Johnsen, Ct. J.).

B. There was an erroneous holding that the allegations of the Amended Complaint setting forth the conspiracy to

eliminate a competitor by unlawful and unfair means from interstate commerce was not sufficient to state a claim under which relief could be granted which is in conflict with

(1) the decisions of this Court in

U. S. v. Masonite Corp., 316 U.S. 265, 62 S. Ct. 1070, 86 L. Ed. 1461 (1942, Douglas, J.);

Interstate Circuit, Inc. v. U. S., 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939 — Stone, J.; Roberts, McReynolds and Butler, J.J. dissenting);

Eastern States Retail Lumber Dealers' Assn. v. U. S., 234 U.S. 600, 612, 34 S. Ct. 951, 58 L. Ed. 1490 (1914, Day, J.).

(2) the decisions of the First, Third and Fourth Circuits. Compare:

Bamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F. 2d 484 (CA-1, 1952, Clark, Ct. J.) c.d. 344 U.S. 817;

Albert Pick-Barth Co. v. Mitchell Woodbury Corp., supra, 57 F. 2d 96 (CCA-1, 1932, Wilson, Ct. J.);

William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738 (CCA-3, 1945, Leahy, D.J.) Opinion on remand, 69 F. Supp. 103, affirmed, 164 F. 2d 1021, c.d. 334 U.S. 811;

Milgram v. Loew's, Inc., 192 F. 2d 579 (CA-3, 1951, Staley, Ct. J.), c.d. 343 U. S. 929;

American Federation of Tobacco Growers, Inc. v. Neal, 183 F. 2d 869 (CCA-4, 1950, Parker, C.J.).

C. There was an erroneous holding that the determination of the "relevant market" for a specialized type of automobile (Hudson) was the whole automobile market in the Baltimore area *as a matter of law* rather than a question to be submitted to the Jury under proper instructions to de-

termine the fact of what the "relevant market" was in that area. This is in conflict with—

(1) The decision of this Court that the issue *is one of fact* in *U. S. v. DuPont de Nemour & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (Reed, J., Warren, C.J. Black and Douglas, J.J. dissenting).

(2) The decision of the Eighth Circuit in *Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co.*, 131 F. 2d 419 (CCA-8, 1942, Riddick, Ct. J.).

2. A vitally important question of Federal law which has not been, but which should be settled by this Court, is involved in that for the first time in the enforcement of the Anti-Trust Laws, the Lower Courts have held that a conspiracy to refuse to deal with, and to destroy by illegal and unconscionable means, a dealer-competitor in an interstate market, between a manufacturer of a specialty automobile, its subsidiary corporation, its employees, and another dealer is *per se* legal and no violation of the Sherman and Clayton Acts, even though entirely unconnected with any independent business reason and solely for the purpose of establishing a monopoly which purpose is consummated with resulting substantial injuries to both the public and the destroyed dealer. This *per se* legality may now for the first time be determined as a matter of law on the pleadings and is based essentially on an erroneous distinction between a "vertical" as contrasted with a "horizontal" conspiracy and an erroneous interpretation of the first *DuPont* case. 351 U.S. 377.

If these important Federal questions are not determined by this Court, there will, at least, be great confusion in the enforcement of the Anti-Trust Laws. There is a wide

divergence of opinion among Judges in the Lower Federal Courts.

Compare:

Opinions of the Circuit Judge Bazelon in *Packard Motor Car Company v. Webster Motor Car Company*, F. 2d and of District Judge Holtzoff in *Webster Motor Car Company v. Packard Motor Car Company*, 135 F. Supp. 4 with the Majority Opinion of Chief Judge Edgerton in *Packard Motor Car Company v. Webster Motor Car Company*, supra, and Chief Judge Thomsen in the *Schwing* case.

There is a divergence of opinion among the Law Professors and Commentators — the majority being of the opinion that the *Schwing* case was improperly decided.

Compare:

"The Resurgence of the Exclusive Territorial Distributorship as an Anti-Trust Problem" 40 Minn. L. Rev. 853, 857-859 (June 1946);

"Recent Developments; Anti-Trust — Exclusive Car Dealership — Elimination of Competitive Dealer", 2 Howard Law Journal 256;

Contra Handler, "Annual Anti-Trust Review, Record of the Association of the Bar of the City of New York", Vol. II, No. 7, Oct. 1936, p. 367.

See also on the general subject:

"Anti-Trust policy and the Cellophane Case", 70 Harvard Law Rev. 281 (Dec. 1956) by Professor Donald F. Turner of the Harvard Law School.

The unwarranted and erroneous extension and misapplication of the first *DuPont* case might result in the emasculation of the enforcement of the Anti-Trust Laws by judicial construction. This Court has already indicated this

by its action in granting a Petition for Certiorari in *Charles Laulor, et al. v. National Screen Service Corp.*, . U.S. . S. Ct. , 1 L. Ed. 2nd 540 (Feb. 25, 1957, per curiam), to indicate that the District Court need not feel bound by the interpretation of the first *DuPont* case as set forth in the Opinion of the Court of Appeals for the Third Circuit. See 238 F. 2d 59.

The unsoundness of the purported distinction between "vertical" and "horizontal" conspiracies is indicated by the recent decision of this Court in *U. S. v. DuPont*, U.S. . S. Ct. , L. Ed. , 25 L.W. 4343, (June 3, 1957 Brennan, J; Burton and Frankfurter, J.J. dissenting).

It is of vital importance that these issues be clarified and determined in a period in which monopoly is increasing, with consequent injury to the public as well as to destroyed competitors.

3. The adoption by the Court of Appeals of the Opinion of the District Court's action on the Motion to Dismiss the Amended Complaint in making assumptions of fact not alleged in the Amended Complaint, without testimony or a Stipulation of the parties, and in using those assumptions of fact to dismiss the Amended Complaint sanctions such a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of suspension.

It is well settled by decisions of this Court and by Courts generally that upon a Motion to Dismiss a Complaint under the Federal Rules, the facts alleged in the Complaint and all inferences favorable to the Plaintiff which can be drawn from the facts alleged must be taken as true by the District Court for the determination of the Motion. To make eleven assumptions of fact, not alleged in the Amended Complaint and not agreed to by Stipulation, in practical effect pre-

vents the Plaintiff from having the facts determined by a jury as elected by it, and represents a usurpation of the jury's function by the District Court. Where the matter arises on the pleadings in an Anti-Trust case, the error is particularly aggravated as Congress intended that private litigation under the Clayton Act should be an aid to the enforcement of the policy of the Anti-Trust laws to supplement enforcement by the Government itself. The actions of the District Court frustrates not only the redress of the Plaintiff's private injuries but the Anti-Trust policy of the United States as well. This Court should correct this and prevent a *judicial* frustration of the enforcement of the Anti-Trust Laws.

ARGUMENT

I.

THE AMENDED COMPLAINT STATED A CLAIM UPON WHICH RELIEF COULD BE GRANTED FOR TREBLE DAMAGES UNDER SECTION 1 OF THE SHERMAN ACT AND SECTION 4 OF THE CLAYTON ACT.

A. The Court of Appeals and the District Court ignored the distinction between violations under Section 1 and Section 2 of the Sherman Act.

In the Amended Complaint there are allegations of both Sections 1 and 2 violations of the Sherman Act and a claim for treble damages under Section 4 of the Clayton Act. There is a conspiracy or combination, both (1) in restraint of interstate commerce (Sec. 1) and (2) to monopolize a part of interstate commerce (Sec. 2).

The *quantum* of allegations and proof for a Section 1 violation with a claim for damages under the Clayton Act is not as extensive in several respects as for a Section 2 violation with a similar claim for damages. To establish

a Section 1 violation, it is *necessary* to allege (and, of course, at the trial, to prove) the following:

(1) The conspiracy—

(2) The purpose or intent of which is by unfair means to eliminate a competitor—

(3) In interstate trade and, by that conspiracy, to suppress competition.

It is not necessary to allege and to prove that:

(1) The unlawful purpose was actually accomplished to the extent of unreasonably restraining interstate trade, if injury has resulted to the competitor,

(2) The public was affected and to what extent.

These last two elements — relevant market and specific public injury — are essential to a Section 2 violation but not to a Section 1 violation.

The elimination of a competitor in interstate commerce by unfair or unlawful means is, *per se*, an injury to the public.

The law in regard to the distinction between Section 1 and Section 2 violations is analyzed and discussed by Mr. Justice Douglas in *U. S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, 60 S. Ct. 811, 846, 84 L. Ed. 1129, 1168-70, in footnote No. 59 and little need be added to that elaborate review of the authorities.

See also:

Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F. 2d 96, 102 (CCA-1, 1932, Wilson, Ct. J.).

in which it is stated:

"If conspiracy is proven, the purpose or intent of which is by unfair means to elimate a competitor in

interstate trade and thereby suppress competition, such a conspiracy, we think, is a violation of Section 1 of the Sherman Act.

"To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent."

White Bear Theatre Corp. v. State Theatre Corp., 129 F. 2d 600 (CAA-8 — 1942 — Johnsen, Ct. J.) at page 602, note 3 in the Opinion;

Report of the Attorney General's National Committee to Study the Anti-Trust Laws, published March 31, 1955 (hereinafter referred to as the "Attorney General's Report"), page 44, note 155.

B. The Amended Complaint alleges a Section 1 violation of the Sherman Act.

1. THE CONSPIRACY OR COMBINATION

The Defendants combined and conspired "in restraint of trade and commerce in Hudson automobiles, parts and accessories among the several states" (3). The allegations then spell out in detail the steps taken by the Defendants to eliminate Schwing and Belair Road Hudson from competition with Bankert. The time of the beginning of the conspiracy, combination and agreement is fixed as beginning in September, 1951 and continuing until the filing of the actions, and it is alleged that the Defendants "did knowingly and unlawfully combine, conspire, agree and have a tacit understanding, together with each other and with divers other persons, to restrain a part of the trade and commerce in Hudson automobiles and Hudson automobile parts and accessories among the several States of the United States and did, in fact, restrain said trade and

commerce in violation of Sec. 1". * * * (5, 6). Two of the purposes of the conspiracy and combination were (1) to eliminate Schwing from competition with Bankert and (2) to restrain and restrict the interstate shipment of Hudson automobiles, parts and accessories from Michigan and other States and the District of Columbia into the State of Maryland (6).

As a matter of pleading, more general allegations than these allegations, and without further specification of facts as has been alleged in the Amended Complaints, as hereinafter set forth, have been held sufficient under the Federal Rules of Civil Procedure. See *Camrel Co., v. Skouras Theatres Corporation*, 57 F. Supp. 811 (D.C. N.J. 1944. Smith, D. J.); *Makan Amusement Corporation v. Trenton-New Brunswick Theatres Co.*, 3 F.R.D. 429 (D.C. N.J. 1944, Forman, D. J.). Compare these allegations with those in *Manderville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 at 225-226; 68 S. Ct. 996, 92 L. Ed. 1328, 1334-35. Petition for Rehearing denied, 334 U.S. 835 (1948 — Rutledge, J.).

2. The Unreasonable Restraint of Interstate Commerce

By its terms, Section 1 of the Sherman Act makes unlawful *every* contract, combination or conspiracy in restraint of interstate commerce. This language has been construed to be limited to those contracts, combinations or conspiracies which *unreasonably* restrain interstate commerce. *Standard Oil Co. of N. J. v. U. S.*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1910 — White, C. J.).

As there is no question that interstate commerce is involved, the question of the "unreasonableness" of the restraint revolves around the issue as to whether there was a conspiracy to eliminate and destroy a competitor by un-

just and unlawful means or whether the conduct was merely an instance of an independent business judgment. *This is basically an issue of fact.*

In the allegations of the Amended Complaint there is nothing to suggest the exercise of any legitimate independent business judgment by the Defendants, but the allegations indicate quite the contrary. It is alleged that Schwing in addition to its facilities at 3324-32 Keswick Road (formerly used by Schwing as a Ford Associated Dealer) expended a total of $79,266.23 in improvements and expanding operations for the Hudson Dealership (3). The business of Schwing had expanded and developed into a substantial, well established and profitable business (5).

Without the prior knowledge of Schwing, Bankert became a Hudson Master Dealer in March, 1951 at Howard and Twenty-fifth Streets, approximately one mile from Schwing's location (5). Schwing was assured by Margetts that its dealership would be continued. Schwing was assured that it was a most desirable dealer and in the Summer of 1951, subsequent to the establishment of the Bankert dealership in March, 1951 but shortly before the conpiracy and combination in September, 1951, Vincent L. Schwing as President of Schwing, was awarded a trip, *as one of the foremost Hudson dealers in the United States*, to White Sulphur Springs and *received a plaque* in recognition of its sales of "The Pacemaker" line of Hudson automobiles (5). There was, therefore, no discontent by Hudson Sales or Hudson Motor with Schwing. In addition to this, Schwing after the conspiracy was in operation demanded that its orders for new Hudson automobiles be filled — at least up to the requirements of the quota contract — but Hudson falsely pretended no such new Hudsons were available. Hudson also falsely pretended that there was difficulty in financing the new orders and per-

sisted in Hudson's refusal to fill the orders even after the falsity of the pretense was demonstrated to it. Schwing did manage to get a few cars to fill a small portion of its orders from other dealers not in competition with Bankert, but orders for 357 new Hudsons (74 for Schwing, 283 for Belair Road Hudson) were not filled. Schwing and Belair Road Hudson were not *failing* as dealers. *They were succeeding too well.*

In addition, Bankert successfully induced Hudson (1) to breach Hudson quota contract and (2) to decline to renew its franchise, without any other reason other than the unlawful conspiracy and combination and contrary to the uniform and continual practice theretofore existing (9).

Burnham and Margetts, acting for Hudson, after Schwing's refusal to resign the dealership, stated that the franchise would not be renewed for the express purpose and for the specific intent of eliminating the competition of Schwing and of Belair Road Hudson, Inc. from the operations of Bankert (10).

Bankert circulated rumors among Schwing's customers that Schwing would lose its franchise and attempted to induce Schwing's key employees to leave the employment of Schwing and enter that of Bankert (7 and 8). Burnham attempted to injure Schwing's credit with the Universal C. I. T. Credit Corporation.

This unconscionable conduct is utterly inconsistent with any independent business judgment; it has every "badge" or ear-mark of the unlawful conspiracy to eliminate competition and can be explained on no other basis. It most certainly is the only basis alleged in the Amended Complaint and that basis is established by the Motion to Dismiss for the purposes of this case.

Mandeville Island Farms v. American Crystal Sugar Co., supra, 334 U.S. 219, at 222; 92 L. Ed. 1328 at 1332-33. Even facts stated to be upon information and belief are taken as admitted for the purpose of the Motion to Dismiss. *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F. 2d 580 (CCA-3, 1948, Kalodner, Ct. J.).

3. The Authorities

The allegations of fact in the Amended Complaint state a Section 1 violation of the Sherman Act, as the following cases indicate:

a. *Supreme Court cases*

U. S. v. Masonite Corp., 316 U.S. 265, 62 S. Ct. 1070, 86 L. Ed. 1461 (1942 — Douglas, J.);

Interstate Circuit, Inc. v. U. S., 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939 — Stone, J.; Roberts, McReynolds and Butler, J J. dissenting);

Eastern States Retail Lumber Dealers' Assn. v. U. S., 234 U.S. 600, 612, 34 S. Ct. 951, 58 L. Ed. 1490 (1914, Day, J.).

b. *Court of Appeals cases*

William Goldman Theatres, Inc. v. Loew's Inc., 150 F. 2d 738 (CCA-3, 1945, Leahy, D.J.); opinion on remand, 69 F. Supp. 103, affirmed, 164 F. 2d 1021, c.d. 334 U.S. 811;

Milgram v. Loew's, Inc., 192 Fd. 2d 579 (CA-3, 1951, Staley, Ct.J.), c.d. 343 U.S. 929;

American Federation of Tobacco Growers, Inc. v. Neal, 183 F. 2d 869 (CCA-4, 1950, Parker, C.J.);

Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F. 2d 484 (CA-1, 1952, Clark, Ct.J.), c.d. 344 U.S. 817;

Albert Pick-Barth Co. v. Mitchell Woodbury Corp. 57 F. 2d 96 (CCA-1, 1932; Wilson, Ct.J.).

See also the following cases:

Forgett v. Scharf, 181 F. 2d 754 (CA-3, 1950 Hastie, Ct.J.);

Sager Glove Corp. v. Bausch & Lomb Optical Co., 149 F. 2d 1 (CCA-7, 1945, Minton, Ct.J. — later Justice);

Roseland v. Phister Mfg. Co., 125 F. 2d 417 (CCA-7 — 1942 — Lindley, D.J.).

These cases show that the *gravamen* of the Section 1 violation is the conspiracy to *eliminate* competition in interstate commerce by unlawful and wrongful means. The unlawful elimination of competition is the *first step* toward monopoly. Congress intended to eliminate the "first step" by Section 1 as well as the "end result", by Section 2.

The Amended Complaint clearly states a Section 1 violation and a claim for damages under the Clayton Act. This required the District Court to overrule the Motion to Dismiss regardless of the District Court's opinion in regard to the sufficiency of the allegations of the Amended Complaint to state a claim under Section 2 of the Sherman Act. It seems clear that the Court of Appeals for the Fourth Circuit should have reversed the District Court for this reason.

II.

THE AMENDED COMPLAINT STATED A CLAIM UPON WHICH RELIEF SHOULD BE GRANTED FOR TREBLE DAMAGES UNDER SECTION 2 OF THE SHERMAN ACT AND SECTION 4 OF THE CLAYTON ACT.

A. Section 2 allegations in the Amended Complaint

The Amended Complaint alleges that the acts and conduct of the Defendants constitutes a "monopolizing of a part of said (interstate) trade and commerce and a combination and conspiracy to attempt to monopolize the same" (3) and spells out the facts in regard to the con-

spiracy. It is alleged that the Defendants "did knowingly and unlawfully combine, conspire, agree and have a tacit understanding, together with each other and with divers other persons, to monopolize and to attempt to monopolize a part of the trade and commerce in Hudson automobiles and Hudson automobile parts and accessories among the several States of the United States and have, in fact, monopolized and attempted to monopolize said trade and commerce in violation of Sec. 2 * * *" (6). Two of the purposes of the conspiracy were (1) to fix arbitrarily the price of used Hudsons as trade-in allowances and to obtain a higher acquisition price for new Hudsons from the purchasing public in the Baltimore area and thus obtain "an abnormal large non-competitive profit" (7) and (2) to monopolize the supplying of Hudson automobile parts, accessories and service to the public in order to obtain higher prices and charges from the public and to render the public less efficient and less convenient service at higher cost (7).

The details of the formation of the conspiracy and the unlawful and unfair actions taken pursuant to it, have already been considered (see pages 10-13 of this Petition) and need not be repeated.

As a result of the unlawful elimination of Schwing and Belair Road Hudson as competitors of Bankert, this latter Corporation "subsequent to September 30, 1952, had and has a virtual monopoly of the sale of new Hudson automobiles, * * * parts and accessories in the City of Baltimore * * *" (10). It is also alleged that this monopolizing power has been used by Bankert Hudson (1) to fix arbitrarily prices of trade-in allowances and to obtain a non-competitive higher acquisition price for new Hudsons from the public in the Baltimore area, (2) charge that public more for Hudson parts, accessories and service and (3) to

render that public less efficient and less convenient service at higher cost (11). These injuries to the public, as well as the number of Hudson automobiles which did not move into Maryland as a result of the conspiracy, are then set forth in Par. 10 of the Amended Complaint (11). These details have already been given in this Petition, see pages 13-14.

These allegations set forth the conspiracy, the intent to monopolize and the actual accomplishment of the conspiracy with injury to the public.

B. The intent to monopolize

In the Attorney General's Report at page 43, it is stated:

> "Monopolizing under Section 2 consists of monopoly in the economic sense — that is power to fix prices or to exclude competition — plus a carefully limited ingredient of purpose to use or preserve such power."

Hudson Motor and Hudson Sales by their control of the manufacture and distribution of new Hudsons, Hudson parts and accessories, unquestionably had the power to exclude competition. After the elimination of Schwing and Belair Road Hudson as competitors of Bankert, this last mentioned conspirator had the power "to fix prices" on new Hudsons, parts and accessories in the Baltimore area. Bankert's purpose was to use its power to fix such prices and it did this.

Under the heading "Predatory Preclusive Practices", the Attorney General's Report at pages 327-328, states:

> "There should be no predatory preclusive tactics, such that their natural effect would be to enable the user to eliminate rivals without regard to their efficiency, or at least, to place them under serious handicaps, irrelevant to their efficiency. It should be noted

> as a practical matter that predatory competition in this sense can usually only be waged where a considerable degree of market power already exists, or where *an attempt is being made to use a long purse in order to destroy or coerce rivals.* Such conduct is regarded therefore as *symptomatic either of monopoly or the intent to monopolize*, or both * * *". (Emphasis supplied.)

In the case of *Interstate Circuit v. U. S.*, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610, supra, the Supreme Court had before it a case involving a purpose to "monopolize" which is similar to the purpose of the Defendants in the case at bar. The Supreme Court held that there was a violation of Section 2 of the Sherman Act where the Exhibitors told the Distributors that they would not purchase the right to exhibit motion pictures unless the Distributors imposed restrictions on the subsequent run competitors of the Exhibitors. The case is not as extreme a case as the case at bar as the Exhibitors did not go so far as to demand that the Distributors cease doing business with the competitors of the Exhibitors. In that case, the Supreme Court rejected the defense of the Distributors that their restrictive agreements with the Exhibitors were protected by the Copyright Law. This case shows clearly that the Supreme Court is of the opinion that the contention of Hudson Motor and Hudson Sales that they have an unlimited right to select their customers and they can never be in violation of the Anti-Trust Laws if they refuse to renew the franchise of the dealer, is unsound. Mr. Justice Stone stated at pages 228-9 of 206 U.S.:

> "Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining com-

> merce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. *The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them.* They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor." (Emphasis supplied.)

The so-called "natural monopoly" held by the manufacturer is subject to the provisions of the Anti-Trust Laws. This was clearly indicated by this Court in *U. S. v. Crescent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944 — Douglas, J.) in which the Supreme Court held that a closely owned group of Exhibitors violated both Section 1 and Section 2 of the Sherman Act by pooling their buying power to obtain from distributors exclusive rights or preferential rights to motion pictures in municipalities where there were competing exhibitors which resulted in the elimination of the competing exhibitors. The Court said at page 181 of 323 U.S.:

> "For example, the defendants would insist that a distributor give them monopoly rights in towns where they had competition or else defendants would not give the distributor any business in the closed towns where they had no competition. The competitor not being able to renew his contract for films would frequently go out of business * * * ."

It is also established that the concellation of a dealership for the sale of *certain makes of automobiles* by the manufacturers as a result of a conspiracy with the manufacturer's Sales Corporation and Finance Corporation, and for the purpose of restraining interstate commerce in those automobiles and controlling the financing of them is a violation of the Sherman Act. *U. S. v. General Motors Corp.*, 121 F.

2d 376 (1941 — CCA-7 — Kerner, Ct. J.) c.d. 314 U.S. 579. Circuit Judge Kerner said at page 400:

> "But there is a limit to how far a manufacturer may go to control the whole process of distribution. The jury found that the Appellants had gone too far with their control plans, and we are inclined to approve and to indorse the jury finding."

The cancellation of a dealership for the unlawful purpose in that case gave rise to a treble damage action under the Clayton Act. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951, Clark, J.)

The District Court sought to distinguish the General Motors case by stating that it "turned on the dominant position of the Company in the industry" (25). A careful reading of the *General Motors* case will indicate that the Defendants in that case were not indicted for monopolizing the automotive industry, but for conspiring to restrain interstate commerce in *General Motors* automobiles, namely commerce in *Chevrolet, Pontiac, Oldsmobile, Buick, LaSalle* and *Cadillac* automobiles (see 121 F. 2d 382-383) with the purpose of controlling the financing essential to the wholesale purchase and retail sale of these *General Motors* automobiles by imposing *General Motor Acceptance Corporation financing on General Motors dealers.* See also the discussion of Circuit Judge Kerner on pages 399, 402 and 403.

It is not the *quantity* but the *quality* of the restraint and the monopoly which is important for the application of the Anti-Trust Laws. Big monopolies from little monopolies grow. Congress intended to root out the seedling as well as the great oak.

The purchasing public in Baltimore has as much right to purchase a Hudson automobile as to purchase a General

Motors automobile, or a Packard automobile, or any other make of automobile. It is damaged if its free choice in a competitive market in any of these is restricted by a conspiracy in restraint of trade or to create a monopoly. Indeed if the conspiracy only "tends" to create the monopoly in the types of automobiles of one company, it is illegal. *U. S. v. General Motors Corp.*, supra.

Then too, it should be remembered that in the *General Motors* case the conspiracy was only between members of the "corporate family" of the manufacturers. In the cases at bar, the unlawful conspiracy was entered into with the "corporate family" and agents of the manufacturer *and a dealer*. This dealer not only conspired but actively helped in the destruction of Schwing and Belair Road Hudson as its competitors. The case at bar presents a more dangerous and aggravated situation than the Government presented in the *General Motors* case, where the conduct merely *tended* to restrict the flow of General Motors cars in interstate commerce, and there was no attempt to eliminate inter-dealer competition.

In the case of *U. S. v. Griffith*, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948 — Douglas, J.), the Supreme Court held that the use by the exhibitors of superior buying power to obtain first-run advantages from distributors violated both Sections 1 and 2 of the Sherman Act even though there was a failure on the part of the plaintiff to show that the exhibitors had a specific intent to acquire a monopoly, which intent is alleged to exist in the Amended Complaint in the case at bar. Even without this specific intent to acquire a monopoly, the Court said at page 106 of 334 U.S.:

> "Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate Sec. 2 of the Sherman Act

unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under Sec. 1. For those things which are condemned by Sec. 2 are in large measure merely the end products of conduct which violates Sec. 1." (Emphasis supplied.)

And at page 107:

"It is indeed, 'unreasonable, per se, to foreclose competitors from any substantial market.' *International Salt Company v. United States,* 332 U.S. 392, 396, ante 20, 26, 68 S. Ct. 12 * * * ."

The *Griffith* case clearly establishes that the unlawful and unfair conduct by Bankert Hudson as a virtual monopolist in a single City violates the Sherman Act as the Court also said at page 107:

"A man with a monopoly of the theatres in any one town commands the entrance of all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places."

See also the following cases involving boycotts and concerted refusal to deal with competitors:

Associated Press v. U. S., 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013, (1944 — Black, J.);

Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941 — Black, J.);

Eastern States Retail Lumber Dealers' Assn. v. U. S., supra;

Montague & Co. v. Lowry, 193 U.S. 38, 24 S. Ct. 307, 48 L. Ed. 608 (1904 — Peckham, J.).

See also the cases involving unreasonable actions by a manufacturer or a distributor in granting exclusive territories to dealers:

Bascom Launder Corp. v. Telecoin Corp., 204 F. 2d 331, and;

U. S. v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (D.C. S.D. N.Y. 1942 — Rifkind, D.J.), affirmed in part 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024 (1944, Reed, J.).

There is nothing in the allegations of the Amended Complaint which would indicate in any way that the destruction of the Hudson Dealerships of Schwing and Belair Road Hudson and their elimination as competitors of Bankert are in any way necessary or proper or reasonable for the protection of Hudson or of Bankert, but on the contrary the allegations show that the conduct was unreasonable and unlawful.

C. The relevant market

In a Section 2 violation, as above indicated, it is necessary to determine what is the "relevant market" in order to determine whether there has been or is likely to be a monopoly. In the Attorney General's Report at page 43, it is stated:

> "Whether monopoly power for purposes of Section 2 exists requires first a definition of the market."

The Amended Complaint alleges that the relevant market is the Hudson market in the Baltimore metropolitan area. The Amended Complaint alleges that the elimination of Schwing and Belair Road Hudson from competition with Bankert in the metropolitan area created a virtual monopoly. The District Court in this case has attempted by facts outside of the Amended Complaint to indicate that

there were two dealers on the perimeter of the Baltimore metropolitan area, but the Record clearly establishes that these ineffective "dealers" were not in competition with the three active competitors and after the elimination of Schwing and Belair Road Hudson, Bankert had accomplished its unlawful purpose and had in fact obtained a virtual monopoly (Appellees' App. 4). A "virtual monopoly" represents an actual or effective monopoly even though the *form* of maintaining non-competitive dealers on the perimeter of the Baltimore area might exist. In other words, the Amended Complaint alleges the *substance* of monopoly even though the *form* of possible competition might have been retained for appearances. In any event, the Amended Complaint alleges an accomplishment of the virtual monopoly, and this must be taken as the fact for the purpose of this case. The District Court and the Court of Appeals unfortunately have confused a *jury argument* which the Defendants will undoubtedly make, for a *fact* alleged in the Amended Complaint. This, of course, cannot be done on a Motion to Dismiss. The District Court and the Court of Appeals in effect were of the opinion that the *entire* automotive market in the Baltimore metropolitan area was the "relevant market". It is submitted that this is an error as the relevant market is the Hudson market in the metropolitan area.

In the first place, the proof will (or may) show that a Hudson automobile is well-known by its trademark name. It is a unique automobile with safety devices, with a performance record, with a specialized type of motor and other features which separate it from the general market for automobiles. A Hudson automobile is a higher priced automobile which appeals to a specialized group of the purchasing public. It seems clearly unreasonable to include *all automobiles* in the relevant market for Hudsons. In other

words, the Hudson automobile is a specialized superior product which is quite different from, and well recognized to be different from, other automobiles. It is marked by *dissimilarity* to other automobiles.

These factors showing an absence of *reactive interchangeability* were not mentioned by the District Court in its opinion, which confines itself to *functional interchangeability* with other makes of automobiles. Both criteria must be established by proof to establish a "relevant market". 40 Minn. Law Review 860-861. See also "The Market: A Concept in Anti-Trust", 54 Columbia Law Review 580 at 586, 588 and 593.

There is a wide gulf between the specialized Hudson and other automobiles and the similarity between cheese, — the latter being involved in *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D.C. Md. 1937 — Chesnut D.J.), much relied upon by the Defendants in the lower court and by the District Court in its Opinion. Hudson cars are not "fungible" and there is no "cross-elasticity" of the demand in the trade for this specialized product.

As aptly stated by Mr. Justice Reed in *U. S. v. DuPont deNemour & Co.*, 351 U.S. 377, 395; 76 S. Ct. 994; 100 L. Ed. 1264, infra, at 1281:

> "Industrial activities cannot be confined to trim categories. Illegal monopolies under No. 2 may well exist over limited products in narrow fields where competition is eliminated."

See also the review of the authorities involving anti-trust violations by producers of single products and businesses of limited scope in note 23, 351 U.S. 396-397.

See also *Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co.*, 131 F. 2d 419 (1942 — CCA-8,

Riddick, Ct. J.) holding that the relevant market was "strawberries" not "berries in general", or the "fruit market" or the "retail food market".

U. S. v. General Motors Corp., 121 F. 2d 327 (1941, CCA-7, Kerner, Ct. J.), c.d. 314 U.S. 579, holding as a fact that the relevant market was the General Motors automobile market, not the automotive market generally.

Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, supra, holding that a dress design and not women's dresses generally was the relevant market.

Secondly, the cases indicate that the relevant market is a *question of fact* to be decided by the Jury — if a Jury trial is elected as in the case at Bar — under all of the facts and circumstances of the case. It cannot be said that a market involving a single product or a product bearing a single brand name cannot be the relevant market. *The relevant market must be established as a matter of fact and not as a matter of law.*

> *U. S. v. DuPont deNemour and Company*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956 — Reed, J., Frankfurter, J. concurring with Reed, Minton and Burton, J.J., Warren, C.J., Black and Douglas, J.J. dissenting.

It should be pointed out that *all* of the Justices of this Court agreed that the question of what is the "relevant market" is a question of fact to be determined by the evidence. It seems clear, therefore, that the *DuPont* case requires a reversal in the case at bar, as the District Court has determined this factual Jury issue as a *matter of law* on the allegations of the Amended Complaint.

As indicated by Mr. Justice Frankfurter, the question of "single-firm monopoly" *is not* decided by the majority of

this Court as he specifically excludes that determination in his concurrence with the majority opinion. Here again, it would seem clear that this issue also is one of fact in each particular case and is not to be determined as a matter of law.

The differences in Hudson automobiles, the special market for the automobiles and their competitive position with other automobiles are all questions to be submitted to the jury and decided at the trial of the case. They cannot be decided as a matter of law on the pleadings in the case.

Then too, it should be remembered that the Hudson market in Baltimore was the market in which all of the parties in this litigation were interested. It was at least of sufficient magnitude and importance for the conspirators in this case to enter the conspiracy and perform the outrageous conduct which eliminated the two competitors of Bankert.

It is well established that a market in a large metropolitan area like Baltimore, is a sufficient market so far as size is concerned. Indeed, it is the *quality* of the restraint and monopoly rather than the *quantity* which is important in Anti-Trust violations.

Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954 — Douglas, J.) involving a local price war in Santa Rosa, New Mexico;

U. S. v. Employing Plasterers Assn. of Chicago, 347 U.S. 186, 74 S. Ct. 452, 98 L. Ed. 618 (1954 — Black, J.) involving plastering materials in the Chicago area;

U. S. v. Griffith, 334 U.S. 100, supra;

White Bear Theatre Corp. v. State Theatre Corp., 129 F. 2d 600 (1942 — CCA-8, Johnsen, Ct. J.) involving the town of White Bear Lake, Minnesota with a population of 2800 persons.

D. Packard Motor Car Co. v. The Webster Motor Car Co., F. 2d (App. D.C., April 18, 1957, Edgerton, C.J; Bazelon, Ct. J. dissenting).

This similar case involving Section 1 and Section 2 violations of the Sherman Act, was filed by The Webster Motor Car Co. (Webster), a Baltimore dealer in Packard automobiles, parts and accessories, against Packard Motor Car Co. (Packard) and Zell Motor Car Company (Zell), the preferred dealer, to recover treble damages under Section 4 of the Clayton Act. In the *Packard* case, Zell was the first established dealer which desired to eliminate Webster's competition in the Baltimore Area and threatened to give up the Packard dealership if Packard did not cancel (or decline to renew) Webster's dealership. Webster (like Schwing had been eminently successful as a Packard dealer. Webster (like Schwing) had a substantial investment in plant, advertising and parts for its Packard dealership.

Packard and Zell conspired to eliminate Webster, accomplished this, so that Zell had a complete monopoly of Packard automobiles, service and parts in the Baltimore area. There were similar public and private injuries as in the case at bar.

District Judge Holtzoff sent the case to the jury under careful instructions and the jury found a verdict for the Plaintiff, Webster, for $190,000.00 damages which the District Court trebled in accordance with the Statute. Motions of the Defendants for Judgment notwithstanding the verdict and for a new trial were denied. 135 F. Supp. 4.

An appeal was taken to the United States Court of Appeals for the District of Columbia and was heard by Chief Judge Edgerton, and Circuit Judges Prettyman and Bazelon on October 18, 1956. The decision was announced on

April 18, 1957 and disclosed a division in the Court, the Majority, Edgerton, C.J. and Prettyman, Ct. J. were of the opinion that Packard and Zell were entitled to judgment so that the District Court was reversed. Judge Bazelon was of the opinion that District Judge Holtzoff's ruling that there was sufficient evidence to go to the jury was correct, and that the judgment should be affirmed.

The Majority agreed substantially with the decision in the Schwing case — the present case involved in this Petition.

An examination of the Majority Opinion indicates that, as in the *Schwing* case, (1) the "relevant market" was held to be the automobile market generally in Baltimore, *as a matter of law*, relying for this result upon a *dictum* of Mr. Justice Reed in *U. S. v. DuPont*, 351 U.S. 377, 393; (2) that, as the "relevant market" was automobiles generally, there was competition at both the buyer and seller levels, there is no *unreasonable* restraint of trade *as a matter of law*.

Judge Bazelon points out in his Dissenting Opinion that the Majority Opinion (1) fails to make a distinction between a Section 1 and a Section 2 violation of the Sherman Act and (2), in his opinion, there was clearly sufficient evidence to justify a jury in finding a verdict for the destroyed dealer under Section 1, as the "common right" of an individual to engage in a lawful calling forms the very basis of the Sherman Act, which was to protect the individual business man as well as to insure to the consumer the benefits flowing from free competition, and, as applied to dealership cases, prevents a manufacturer from combining and conspiring with one dealer not to deal with another.

It is submitted that the Majority and Dissenting Opinions in the Packard case pose the important legal questions which should now be settled by this Court. It is also submitted that Judge Bazelon's careful analysis of the decisions of this Court and of the Federal Courts generally and District Judge Holtzoff's Opinion in ruling on the Motion for Judgment N. O. V. or for a new trial present the correct view of the applicable law rather than the Majority Opinion in *Packard* or the Opinions in *Schwing*. The commentators generally (with the exception of Professor Handler of the Columbia Law School) have come to this conclusion, see—

> "The Resurgence of the Exclusive Territorial Distributorship as an Anti-Trust Problem", 40 Minn. L. Rev. 853, 857-859 (June 1946);
>
> "Recent Developments: Anti-Trust — Exclusive Car Dealership — Elimination of Competitive Dealer", 2 Howard Law Journal 256;
>
> *Contra* Handler, "Annual Anti-Trust Review, Record of the Association of the Bar of the City of New York", Vol. II, No. 7, Oct. 1956, p. 367.

See also on the general subject:

> "Anti-Trust Policy and the Cellophane Case", 70 Harvard Law Rev. 281 (Dec. 1956) by Professor Donald F. Turner of the Harvard Law School.

In applying the "Rule of Reason" to the present situation in the automobile industry, this Court should not be unmindful of the monopolistic trend in this industry and the injury to the public which must inevitably result from that trend. The decisions in *Schwing* and *Packard*, which in effect establish for the first time a *per se* legality for so-called "vertical combinations" unconnected with any legiti-

mate business purpose or business judgment, but only to eliminate a competitor by unlawful and unfair means, are like the application of gasoline to quench the fires of monopoly."

Professor Turner stated at page 305 of his Article:

> "If defendants are attempting to drive someone out of the market by foul means rather that fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal, though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59 (1940)."

and at page 307:

> "It is reasonable to discard any refined concept of market in attempt and conspiracy cases because the conduct involved is so egregious that it may be appropriately condemned *per se*."

The purported distinction between "vertical" and "horizontal" conspiracies which has apparently controlled the writers of the decisions in *Schwing* and *Packard*, has no real validity as a distinction so far as the Sherman and Clayton Acts are concerned. Even Professor Handler concedes this, as he states at p. 376 of his Article:

> "For it is clear that the effect of a plurality of restrictive territorial franchises is to eliminate competition at the dealer level in the manufacturer's products. And it is equally clear that if the dealers had

agreed among themselves to achieve the identical allocation of territories and freedom from competition, such collective horizontal action would constitute a conspiracy to divide markets in violation of the Sherman Act." Citing Addyston Pike and Steel Company v. U. S., 175 U.S. 211, 241 and U. S. v. Aluminum Company of America, 148 F. 2d 416, 427.

"It is arguable, therefore, that the legality of a division of territories should not depend on whether the division springs from a series of separate vertical agreements between a manufacturer and his dealers, or from a horizontal agreement among the dealers. The effect on competition may be identical in either event."

More importantly, this Court has indicated that the public is to be protected against "vertical" conspiracies tending substantially to lessen competition. *U. S. v. DuPont*, U.S. . S. Ct. L. Ed. . 25 L. W. 4343, (June 3, 1957, Brennan, J., Burton and Frankfurter, J.J. dissenting).

It seems manifest that this attempted distinction has no validity in the present case. If Bankert, Schwing and Belair Road Hudson had conspired to divide the Hudson market in Baltimore City, the conspiracy would undoubtedly have been illegal and in violation of the Sherman Act. Why? Because it eliminates competition in *that market*. The accomplishment of the same result by a more dastardly and injurious method, namely, the conspiracy of the manufacturer, Hudson Motor, and its distribution agency, Hudson Sales, with one dealer, Bankert, to destroy Schwing and Belair Road Hudson and in that way obtain a virtual monopoly in the *same* City and in the *same* market is supposed to be entirely legal *per se*. This could hardly be the law!

In the former situation, the public would have at least three locations for service and for parts, as well as purchases of new Hudson automobiles even though the public would have to pay higher prices. In the second situation (the case at bar), even those benefits to the public are eliminated, two well-established businesses are destroyed and there is no hope that the monopoly will be eliminated by competition being restored inasmuch as the competitors have been destroyed. In short, the public is *more injured* in the *same locality* and in the *same market* in the second situation which is supposed to be entirely lawful; then it would be in the former situation which is conceded to be illegal. This fantastic result is not likely to have been the intention of Congress in passing, or of this Court in construing, the Sherman Act.

In any event this Court, in the public interest, should determine finally this important issue for the protection of the public under the Sherman Act as well as individual business men who have been injured by the conspiracies.

III.

THE ACTION OF THE COURT OF APPEALS IN ADOPTING THE OPINION OF THE DISTRICT COURT AND IN APPROVING THE ACTION OF THE DISTRICT COURT ON THE MOTION TO DISMISS THE AMENDED COMPLAINT IN MAKING ASSUMPTIONS OF FACT NOT ALLEGED IN THE AMENDED COMPLAINT, WITHOUT TESTIMONY OR A STIPULATION OF THE PARTIES, AND IN USING SUCH ASSUMPTIONS OF FACT TO DISMISS THE AMENDED COMPLAINT SANCTIONS AN UNWARRANTED AND ERRONEOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In the *Packard* case, the destroyed dealer at least was heard on the merits before the jury it elected. In the *Schuring* case, it never was. One of the fundamental errors of the District Court in *Schuring* which does not exist in

Packard, was in the District Court's attempt to act as a trier of facts on the merits instead of assuming the correctness of the allegations of fact in the Amended Complaint and the inferences from those facts.

The "erroneous assumption of facts" are as follows:

1.

"Plaintiffs concede that there are many dealers for other makes of automobiles in all parts of the City and the metropolitan area" (20).

The Schwing and Belair Road Hudson made no such concession, but expressly declined to do so and confined the hearing to the allegations of the Amended Complaints (Appellees' App. 3). The general statement is of little importance in any event.

2.

"Plaintiffs do not contend that either Bankert or Hudson held a dominant position in the manufacture or sale of automobiles in Baltimore or anywhere else Only (sic) a 'virtual monopoly' in the sale of new Hudson automobiles and Hudson parts and accessories in Baltimore is alleged" (20).

Thus does the District Court give the Plaintiffs the benefit of all inferences from their allegations in the Amended Complaints!

3.

"There is no allegation that Hudson did not ship to Plaintiffs and to its other dealers in 1952 a sufficient number of automobiles to supply all persons in the City of Baltimore and elsewhere in the State of Maryland who wished to buy Hudson automobiles? (22-23).

This is contrary to the allegations of the Amended Complaints and every inference to be drawn from those allegations. The "order" is an offer of sale which is an effective contract when accepted by

Hudson. Unless the automobiles were sold to the public by the dealer, no order would have been sent in by the dealer. Schwing, notwithstanding the refusal of Hudson to accept Schwing's orders, obtained 40 additional new Hudson automobiles from other dealers not in competition with Bankert. This shows that the orders represented sales. Sales result from public demand. In any event, it is specifically alleged that new Hudsons not delivered as agreed "were not otherwise sold in the State of Maryland * * * which but for said conspiracy and combination would have moved into the State of Maryland in interstate commerce;" and Schwing believes there would have been many more new Hudsons sold by it, which would not otherwise been sold in Maryland, which did not move because of the unlawful conspiracy. These allegations certainly mean that the public demand for the new Hudsons mentioned was not filled in Maryland because of the unlawful conspiracy.

4.

"There is no allegation that there was any dearth in the supply of automobiles in general, or of Hudson automobiles in particular" (23).

It is alleged that the orders of Schwing (and of Belair Road Hudson) were not filled because of a falsely stated lack of supply by Hudson; that a few cars were obtained from other Hudson Dealers, and that the balance of the cars ordered and many others were not sold in Maryland which would have been sold but for the conspiracy. See Comment under 3.

5.

"It is not alleged that the public could not have bought as many Hudson automobiles as it wished either from Bankert or from the two other Hudson dealers in the Baltimore metropolitan area."

See the comments under 4, supra, and under 3, supra. It is also misleading to refer to the "two other Hudson dealers in the Baltimore metropolitan area" as there is nothing in the Amended Complaints in regard to this, and these inconsequential dealers in the outskirts of the metropolitan area were not in competition with Bankert. The "virtual monopoly" was for all practical purposes "a monopoly".

6.

"The allegations, on information and belief, that the 357 automobiles were not otherwise sold, and that 'it believed' that an even greater number could have been sold had it not been for the alleged conspiracy, does not show that in 1952 the public was unable to buy at competitive prices all of the automobiles that it wished to buy, or even that it was unable to buy at competitive prices all the Hudson automobiles which it wished to buy" (23):

See the comments under 4 supra and under 3 supra. The implication is that facts alleged on information and belief need not be taken as facts for the purposes of the Motion to Dismiss. The law is to the contrary. See *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F. 2d 380. Then too, the allegations of the startling decline in Hudson Sales as a result of the conspiracy and contrary as compared with the Hudson experience in other States as alleged in Paragraph 10 of the Amended Complaint (13-14), would clearly indicate that the

public could not buy Hudsons at competitive Hudson prices in the Baltimore metropolitan area. At least the inference might well be drawn to that effect — not to the contrary.

7.

"The figures (those alleged in Paragraph 10B — (13)) show merely that for one reason or another the Maryland public purchased fewer automobiles. The decrease may well have been due to competition with other makes, which continued unabated" (23).

The District Court was not required to draw any inference; it is definitely alleged that the decline in registration was "a direct consequence and result of the unlawful combination and conspiracy (11, 13)." Without the direct allegation, the District Court could — and should — have drawn a favorable, rather than an unfavorable inference.

8.

"It is hard to understand why Hudson should have conspired with anybody to sell fewer Hudson automobiles" (23).

The District Court need not have posed the question as the *fact* that it did so, is alleged. No doubt the proof will show why it did.

9.

"It is stated without contradiction at the hearing that Hudson sold about 2% of the automobiles sold in the United States, and that the percentage in the City of Baltimore and the State of Maryland would not be far different" (25).

The 2% figure was not conceded and the argument was restricted to the allegations of the Amended Complaint (Appellees' App. 3). There is nothing whatever in the Record about the purported 2% figure being specifically applicable to

Baltimore City or to the State of Maryland. It is curious that the direct allegations of the Amended Complaint in regard to the registration figures are brushed aside, but purported facts *not alleged or stipulated or otherwise appearing in the Record* are given the status of established facts.

10.

"The owner of an old Hudson could sell it to a used-car dealer and buy a new Hudson for cash, or could trade in his old Hudson on a new car of another make" (25).

Not only is this irrelevant, but it is contrary to the established practice in the sale of new Hudsons. The Hudson customer wishes to buy a new Hudson, not a Ford or an Austin; he expects to receive and does receive, his best trade-in allowance from a Hudson dealer. As a result of the conspiracy and virtual monopoly he pays a higher acquisition price and Bankert has obtained and is obtaining from the public "an abnormally large non-competitive profit upon the sales of new Hudson automobiles and such trade-in allowances" (11). It is difficult to see why the District Court should speculate and draw unfavorable inferences from the speculation; the facts are alleged. Speculation is unnecessary.

11.

"More importantly, the owner of an old Hudson who was not satisfied with Bankert's trade-in offer could go to either or both of the other Hudson dealers in the Baltimore metropolitan area and see what they would offer in trade."

There "other Hudson dealers" were not in competition with Bankert. Nothing about them ap-

pears in the Amended Complaint. It is alleged that Bankert had a virtual monopoly. It did. See discussion under 5 supra.

The District Court in the case at bar fell into the same errors as did the District Court for the Eastern District of Arkansas in *Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co.*, 40 F. Supp. 897 (1941 — Lemley, D. J.) reversed and remanded, 131 F. 2d 419 (1942, CCA-8, Riddick, Ct. J.). The decision of the Court of Appeals for the Fourth Circuit is in direct conflict with this decision of the Eight Circuit.

The District Court and the Court of Appeals also failed to heed the admonition of Mr. Justice Black in the case of *U. S. v. Employing Plasterers Assn. of Chicago*, 347 U.S. 186, 74 S. Ct. 452, 98 L. Ed. 618 (1954) in which he states at page 189 of 347 U.S.:

> "The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12(e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56.
>
> "We hold it was error to dismiss the Government's complaint for failure to state a cause of action."

CONCLUSION

The decision in this case is one of vital importance. It is of vital importance not only to the protection of the public in interstate commerce by the Sherman and Clayton Acts, but also to the individual dealers throughout the United States who have been, and are being victimized by monopolistic conspiracies. The holding of *per se* validity of exclusive dealer arrangements resulting from conspiracies and illegal and unlawful methods of accomplishment, will inevitably result in great public and private injury and will further the destruction of the beneficient public policy written into the law of the United States by the Sherman and Clayton Acts. This Petition for a Writ of Certiorari should be granted by this Court. It is respectfully prayed that this Court grant the Petition for a Writ of Certiorari, as herein prayed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7220.

Schwing Motor Company, Incorporated,
a Maryland Corporation,
Appellant,

versus

Hudson Sales Corporation, a Michigan Corporation, Hudson Motor Car Company, a corporation of Michigan, Bankert Hudson, Inc., a Maryland Corporation, Martin A. Bankert, Frank Burnham, Claude W. Margetts,
Appellees.

No. 7221.

Belair Road Hudson, Inc., a Maryland Corporation,
Appellant,

versus

Hudson Sales Corporation, a Michigan Corporation, Hudson Motor Car Company, a corporation of Michigan, Bankert Hudson, Inc., a Maryland Corporation, Martin A. Bankert, Frank Burnham, Claude W. Margetts,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

(Argued November 8, 1956. Decided December 17, 1956.)

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

Wilson K. Barnes (D. Sylvan Friedman on brief) for Appellants, and William L. Marbury and Roger A. Clapp (John Martin Jones, Jr., Richard W. Lawson, John S. Stanley, and Hershey, Donaldson, Williams & Stanley on brief) for Appellees.

PER CURIAM:

These are appeals from orders dismissing on the pleadings actions by two local automobile dealers to recover damages under the Sherman and Clayton antitrust acts from an automobile manufacturer's sales corporation and a local dealer to whom an exclusive dealership or agency had been granted. The plaintiffs had formerly held dealership contracts with the sales corporation of the manufacturer for dealing in the make of automobiles in question; but there is no claim of right to recover damages on account of breach of contract; and there is no allegation or contention that the exclusive dealership was a part of or incidental to any conspiracy or agreement to monopolize or restrain trade between manufacturers or wholesale dealers. The facts are fully stated in the opinion of the District Judge and we agree with him that no violation of the Sherman or Clayton Acts is alleged for reasons adequately stated in his opinion, which is adopted as the opinion of this court. See *Schwing Motor Co. v. Hudson Sales Corporation*, 138 F. Supp. 899.

Affirmed.

APPENDIX B

Sec. 1. Trusts, etc. in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenances of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

SEC. 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Secs. 2, 26 Stat. 209.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 214

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Daily Record Co., Baltimore 3, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1114

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of Hudson Sales Corporation, Hudson Motor Car Company and Frank Burnham, three of the named respondents,[1] in opposition to the petition of Schwing Motor Company, Incorporated, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the Dis-

[1] The two Hudson corporations are hereinafter collectively referred to as "Hudson", and respondents Bankert Hudson, Inc. and Martin A. Bankert are hereinafter collectively referred to as "Bankert".

trict Judge's dismissal of petitioner's amended complaint on the ground that it failed to state a claim upon which relief could be granted.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (THOMSEN, Ch.J.) is reported at 138 F. Supp. 899 and reprinted in the Appendix filed by the petitioner as appellant in the Court of Appeals (at pp. 15-29). The Court of Appeals (PARKER, SOPER and SOBELOFF, J.J.) affirmed the decision in a brief *per curiam* order (239 F. 2d 176, reprinted as Appendix A to the petition) in which the District Judge's opinion was adopted as the opinion of the Court of Appeals.

STATEMENT OF THE CASE

Although somewhat obscured by extraneous and conclusory allegations, the *gravamen* of the amended complaint is that Hudson agreed to give Bankert an exclusive dealership (or, as characterized in the amended complaint, a "virtual monopoly") in the sale of Hudson automobiles, parts, accessories and services within the City of Baltimore, Maryland; and that pursuant to such agreement (or, as characterized in the amended complaint, such "conspiracy") and as a necessary result thereof, the one-year non-exclusive dealership franchises of the petitioner, a Hudson dealer since 1945 under a series of such one-year franchises, and of one other dealer in the City of Baltimore were not extended or renewed (or, as characterized in the amended complaint, Bankert "induced" Hudson not to renew such franchises) after they expired by their own terms on September 30, 1952. In addition, the amended complaint alleged, (1) that the respondents informed petitioner's financing and business contacts that petitioner's franchise would not be re-

newed, (2) that Bankert made an abortive attempt to hire one of petitioner's employees, and (3) that Bankert "induced" Hudson to breach its existing franchise agreement with petitioner by failing to deliver certain automobiles to which petitioner contends it was entitled.

The motive for such actions or non-actions, as alleged in the amended complaint, was the elimination of the petitioner as a competitor of Bankert in the distribution of Hudson products within the City of Baltimore and the establishment of a "virtual monopoly" thereof within such area "in order to obtain higher prices and charges therefor from the public and to render to the public less efficient and less convenient service at such higher costs." Thus, the amended complaint purports to allege that the respondents conspired (1) to restrain trade in Hudson products moving into the City of Baltimore, and (2) to monopolize the distribution of Hudson products in the City of Baltimore.

The trial judge held that Hudson could lawfully establish an exclusive dealership for the sale of its own branded products and that the elimination of competing dealers and the channeling of the distribution of its products which necessarily results therefrom do not render such an arrangement, or the agreement between the manufacturer and the exclusive dealer to establish such an arrangement, an unlawful restraint of trade condemned by Section 1 of the Sherman Act or an unlawful monopoly in violation of Section 2 of the Sherman Act. He further held that the other alleged activities — even if actionable under the laws of Maryland — did not convert the case into one cognizable under the anti-trust statutes. Since petitioner expressly disclaimed any purpose to state a cause of action except under the anti-trust laws, Judge THOMSEN concluded that the complaint should be dismissed. The Court of Appeals affirmed and adopted the opinion of Judge THOMSEN.

NO GROUNDS EXIST FOR GRANTING THE WRIT

I.

The Question Involved is Not Novel

In the absence of an intent to monopolize or restrain trade in a given *commodity*, the right of a single manufacturer who does not dominate the market (local or national) in such commodity to establish an exclusive dealership within a single city for the sale of his own *brand* of such commodity in free and open competition with other brands of the same commodity has been uniformly upheld, both at common law[2] and under the anti-trust statutes.[3] And it has been so held even though the very essence of such an arrangement is the prevention or elimination of competition between the exclusive dealer and other former or "would-be" dealers in the brand in question, with the necessary result that the exclusive dealer is thereby given the power to control the price at which the brand in question will move into consumption within the geographical area covered by his franchise, subject only to the competitive pressures exerted by other brands.

So firmly established is this right, both in the decided cases and by virtue of the unchallenged merchandising practices of American business, that no court even questioned it until the decision of District Judge HOLTZOFF in *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4. The state of the law prior to Judge HOLTZOFF's decision was very

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[2] *Donovan v. Pennsylvania Co.*, 199 U. S. 279; *Delaware Lackawanna & Western Railroad Co. v. Town of Morristown*, 276 U. S. 182; *Black & White T. & T. Co. v. Brown & Yellow T. & T. Co.*, 276 U. S. 518.

[3] See for example: *Bascom Launder Corp. v. Telecoin Corp.* (2d Cir. 1953), 204 F. 2d 331, 335, cert. den. 345 U. S. 994; *Fargo Glass & Paint Co. v. Globe American Corp.* (7 Cir. 1953), 201 F. 2d 534 cert. den. 345 U. S. 942; and see *United States v. Addyston Pipe & Steel Co.* (6th Cir. 1898), 85 Fed. 271, 282, aff'd. 175 U. S. 211.

clearly summarized by Professor HANDLER in his 1956 "Annual Anti-Trust Review" wherein he stated, with appropriate citation of authorities:[4]

> "Consonant with the rule at common law, exclusive selling agreements have traditionally been regarded under the Sherman Act as one of the ancillary restraints having a legitimate business purpose. As such, they have been sustained as affording fair protection to the buyer without injuring the public. * * * Where the exclusive is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality.
>
> "Then came Judge Holtzoff's decision invalidating an exclusive distributorship in *Packard*."

While accepting the general principle thus later stated by Professor HANDLER, Judge HOLTZOFF undertook to limit its application to cases in which the manufacturer acted independently and without request from one of the competing dealers. But Judge THOMSEN recognized that any such limitations would require important business decisions to be made in a vacuum and declined to follow Judge HOLTZOFF in this novel departure from accepted principles. After Judge THOMSEN's opinion in the present case had been affirmed by the Court of Appeals for the Fourth Circuit, the Court of Appeals for the District of Columbia reversed Judge HOLTZOFF, in *Packard Motor Car Company v. The Webster Motor Car Company*, 243 F. 2d 418, and quoted HANDLER with approval at p. 240.

Respondents respectfully submit that the question involved is not novel and that the decision below clearly follows well established patterns.

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[4] *Record of the Association of the Bar of the City of New York*, Vol. 11, No. 7, Oct. 1956, p. 367, at pp. 369-370.

II.

There Is No Conflict Of Decision

Although the petitioner contends that the decision below is in conflict with certain decisions of this Court and of the lower Federal courts, it is significant that no attempt is made to compare the vitally different facts in the cases cited with the facts alleged in the amended complaint. *All* of the cases cited by the petitioner involve conspir-

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[5] *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (cited at pp. 16 and 22 of the petition) involved a conspiracy between competing oil companies to raise the price of gasoline in "spot market" areas; *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp.* (1 Cir. 1932), 57 F. 2d 96 (cited at pages 16, 17, 22, 27 of the petition) involved a conspiracy by the nation's largest manufacturer of kitchen utensils to drive a competitor out of business and to monopolize the market in kitchen utensils, not the "market" in the defendant's brand of kitchen utensils; *White Bear Theatre Corp. v. State Theatre Corp.* (8 Cir. 1942), 129 F. 2d 600 (cited at pp. 16, 23, 40 of the petition) involved an attempt by a theatre owner to drive the only other theatre in town out of business and thus completely dominate and monopolize the local exhibition of all motion pictures; *U. S. v. Masonite Corp.*, 316 U. S. 265 (cited at pp. 17, 27 of the petition), involved a price fixing combination between a manufacturer and its competitors to maintain the price of the manufacturer's products; *Interstate Circuit, Inc. v. U. S.*, 306 U. S. 208 (cited at pp. 17, 27, 31 of the petition), *Milgram v. Loew's, Inc.* (3 Cir. 1951), 192 F. 2d 579, c.d. 343 U. S. 929 (cited at pp. 17, 27 of the petition) and *William Goldman Theatres, Inc. v. Loew's, Inc* (3 Cir. 1945) 150 F. 2d 738 (164 F. 2d 1021, c.d. 334 U. S. 811 (cited at pp. 17 and 27 of the petition) all involved price fixing agreements and exclusionary conspiracies by eight motion picture distributors who dominated 75-80 per cent of the market and local exhibitors who had a series of local monopolies of first run films; *Eastern States Retail Lumber Dealer's Assn. v. U. S.*, 234 U. S. 600 (cited at pp. 17, 27 and 35 of the petition) involved a conspiracy between competing retail lumber dealers to suppress retail competition by boycotting wholesalers who sold lumber directly to the consumer; *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (1 Cir. 1952), 194 F. 2d 484 (cited at pp. 17, 27 of the petition) involved a conspiracy by competitors who controlled the local warehousing accommodations to exclude a competitor from competition in the local produce market; *American Federation of Tobacco Growers, Inc. v. Neal* (4 Cir. 1950), 183 F. 2d 869 (cited at pp. 17, 27 of the petition) involved a conspiracy by competitors who completely controlled the

acies among competitors to fix prices or divide markets, or attempts to monopolize the national or local market in a given *general commodity* — a far cry from the "conspiracy" alleged in the instant case between a manufacturer and a dealer to establish an exclusive dealership within a single city for the sale of its one minor brand in free and open competition with many other brands of the same commodity.

Coming now to the petitioner's specific contentions with respect to the conflict of decision alleged to exist, the substance of the petitioner's argument set forth in sub-paragraphs A and B of paragraph 1 (pp. 16-17 of the petition) is that the allegations of the amended complaint state a *per se* violation of Section 1 of the Sherman Act, and that the holding to the contrary by the court below is in conflict with decisions of this Court and of lower federal courts.

The petitioner's contention of *per se* violation is based upon general statements that the petitioner has culled from the court's opinion in the case of *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F. 2d 96,[6] which are to the effect that the elimination of a competitor by *unfair or unlawful means* constitutes a *per se* violation of Section 1 of

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local sale of tobacco to exclude the plaintiff from competition in the local tobacco market; *Forjett v. Scharf* (3 Cir. 1950), 181 F. 2d 754 (cited at p. 28 of the petition) involved an attempt to drive sole competitor out of business and monopolize the whole industry of automatic film development; *Sager Glove Corporation v. Bausch & Lomb Optical Co.* (7 Cir. 1945), 149 F. 2d 1 (cited at p. 28 of the petition) involved a conspiracy by parties dominating the market of lenses for industrial goggles to monopolize the entire industry; *Roseland v. Phister Mfg. Co.* (7 Cir. 1942), 125 F. 2d 417 (cited at p. 28 of the petition) involved a conspiracy by three competitors who were the sole producers of certain fire preventive equipment to divide territory and fix non-competitive prices for entire industry.

[6] Petitioner also cites *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, and *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d 600, in connection with this contention. However, neither of these cases are authority for the extreme position taken by the petitioner.

the Sherman Act. However, the decision and the principles announced in the *Albert Pick-Barth* case are wholly inapplicable here. In the first place, that case involved the familiar pattern of a corporation holding a dominant position in the industry, which effectively drove out of business a substantial competitor. Nothing of that nature is involved in the case at bar. In the second place, the only "means" alleged in the amended complaint by which it is said that the petitioner was eliminated as a competitor was the non-renewal of the petitioner's expiring franchise agreement,[7] but in *Hudson Sales Corporation v. Waldrip* (5 Cir. 1954), 211 F. 2d 268, (cert. den., 348 U. S. 821), where a similar Hudson dealer franchise agreement was involved, it was clearly held that the dealer had no tenure or right to renewal of such a franchise agreement.

Faced with this problem, petitioner contends that failure to renew its franchise became illegal because of Hudson's agreement, or "conspiracy", with Bankert. Petitioner cites no authority which supports such bare contention and it obviously is not sound because otherwise, as a practical matter, no exclusive dealership can ever be lawfully established. This follows because no manufacturer could safely fail to renew existing franchise agreements in order to establish an exclusive dealership unless he had already entered into a prior agreement with the exclusive dealer, for otherwise he would not be certain that he would have any representation in the area in question after the termination of the existing franchises. To place a small auto-

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[7] The amended complaint contains allegations of some additional acts from which the petitioner argues that the motive for failure to renew its franchise was to eliminate the petitioner as a competitor and that the non-renewal did not result from exercise of "independent business judgment". However, both the allegations of the amended complaint as well as the argument contained in the petition make it clear that such acts do not constitute the *means* by which the petitioner was eliminated from inter-dealer competition.

mobile competitor such as Hudson into such a straitjacket would be unrealistic, unjustifibly damaging to Hudson's competitive situation, and thus injurious to the public interest.

The respondents believe and contend that the restraint on inter-dealer competition inherent in all exclusive dealerships is not and was never intended to be condemned by the Sherman Act, and that the *means* employed — even if actionable under the laws of a given state — do not render such restraint illegal. *Apex Hosiery v. Leader*, 310 U. S. 469. However, even under the petitioner's theory the only "unfair and unlawful means" was the failure to renew its expiring franchise agreement, which petitioner says was pursuant to an agreement between the manufacturer and the exclusive dealer to grant the exclusive dealership — an indispensible element in the establishment of any exclusive franchise.

The fact of the matter is that exclusive dealerships, whether brought about by the failure to renew existing dealerships or otherwise, have always been uniformly upheld under circumstances such as those presented in the instant case,[8] and the decision below cannot be said to have created a conflict by following such well established principles.

The remaining area of alleged conflict concerns the determination of "relevant market" for the purpose of testing the sufficiency of the amended complaint insofar as it attempts to charge a violation of Section 2 of the Sherman Act. The respondents do not dispute the general proposition that the determination of "relevant market" in any given case is a question of fact and the decision below did not hold otherwise. However, as with any question of fact,

[8] See cases cited *infra*, Section IV, p. 12 *et seq.*

the trial court is not obliged to submit the issue to a jury when, under the circumstances, reasonable men could reach but one conclusion. The petitioner's main objection is that the district court refused to close its eyes to the obvious fact that there were numerous other makes of automobiles reasonably interchangeable[9] with Hudson automobiles and held the relevant market to be the local market in *automobiles generally* and not the local market for the distribution of Hudson automobiles. Not only is the district court's ruling on this point in accord with the case of *Ford Motor Co. v. Benjamin E. Boone, Inc.* (9 Cir. 1917), 244 Fed. 335, but it is also directly in line with this Court's pronouncement in *U. S. v. duPont & Company*, 351 U. S. 377, wherein this Court, almost as if in answer to the petitioner's contention, stated:

> "Every manufacturer is the sole producer of the particular commodity it makes, but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand between cellophane and the other wrappings. This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities. [pp. 380-381]
>
> * * * * * *
>
> "However, this power that; let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. 'Illegal power must be appraised in terms of the competitive market for the product." [p. 393]

[9] The petitioner attacks the district court's ruling on this point on the ground that it was not a matter as to which the court could properly take judicial notice. However, it is interesting to note that although the petitioner devotes several pages of the petition in an effort to have this Court take judicial notice of the reasons why the Hudson automobile should be placed in a class by itself, the amended complaint does not allege any such specialized features.

Were the petitioner's contentions sound, the relevant market in the *duPont* case would have been *not* the market in flexible packaging material (as this Court found) or even the market in cellophane (as the government contended) but rather the market in *duPont cellophane* — a contention which we doubt would have been seriously considered by this Court.

In short, the decision below is not in conflict with any decision of this Court or of the lower federal courts but represents the application of well established principles to the particular facts presented.

III.

The Decision Below Was Not Based Upon Unwarranted Factual Assumptions.

It is said that the District Judge improperly assumed the existence of eleven facts (as outlined on pp. 47-51 of the petition for the writ of certiorari), and thus violated sound principles of judicial administration previously announced by this Court. For the most part those matters are not "factual assumptions" at all. Several of them (Nos. 2, 3, 4 and 5) are correct assertions by the District Judge that in the amended complaint certain matters are not alleged or contended; several others (Nos. 10 and 11) are obviously correct observations; several others (Nos. 6, 7 and 8) are purely argumentative, in complete harmony with proper judicial administration; one of them (No. 9) accurately reflects something that occurred at the hearing before the District Judge (see Appellees' Appendix, pp. 2-3), and the remaining one (No. 1) is nothing more than a statement of a matter of common knowledge which, like the fact that Hudson enjoys only a very small percentage of the automobile market, the court could not ignore without stultifying itself.

IV.

The Decision Below Was Clearly Correct

The respondents do not believe any extended discussion of the merits to be proper at this stage of the proceedings. However, they do feel it appropriate to point out that the decision below was clearly correct and based upon ample authority.

As early as 1917 the Court of Appeals for the Ninth Circuit in the case of *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335, surveyed the practice, even then well-established, of granting geographical franchises to automobile dealers and applied principles dictated by authority as well as common sense. The case involved the legality of Ford's method of distribution and its dealership agreements which granted geographical franchises to dealers selected by Ford to the exclusion of others. In reviewing and denying the contention that these matters involved unlawful restraint of trade, the court made the following significant comments (at pp. 341-342):

> "Whatever its merits, the Ford car is not, except in the most remotely relative sense, essential to the well-being of the public or any group thereof, or any individual. There are other automobiles in great variety available to any one who has need and desires to purchase, some cheaper, some more expensive, some less efficient, some more efficient, some less attractive in appearance, others more attractive, Cole Motorcar Co. v. Hurst (C. C. A. 5th) 228 Fed. 280, 284, 142 C. C. A. 572. Obviously, therefore, the public already has competition to the fullest extent desirable, not a competition entailing the waste of duplication and overlapping effort in marketing the product, with sporadic price-cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly dif-

ferent. Is not each manufacturer now under the highest sort of pressure from without? Must it not be alert to discover new improvements and conveniences and to keep down to the minimum the cost of construction and distribution? It is a matter of public knowledge that fortunes are spent in advertising these competitive products, in an effort to attract and cultivate public favor. Under such conditions, will the public be benefited by requiring the manufacturer to assume the further burden of internal guerrilla competition, with the confusion and waste entailed thereby? It is futile to say that such a burden will fall not upon the manufacturer or the public, but upon the local dealer or distributor. If there were ten dealers selling Ford cars in Portland, where there is now but one, would not the expense of marketing be greatly increased, and if, as is contended, the contract under consideration is harsh to the 'dealer', does it not follow that, with the trade divided into ten parts, and with the expense of rentals and personal service multiplied, the price of the car to the public would increase? Does any one suppose that such dealers would for any considerable length of time cut the price? In the light of experience is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most economical method, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies?"

In keeping with the principles enumerated in the *Ford* case, the courts have consistently held that the failure to

renew dealership contracts, whether pursuant to an agreement or "conspiracy" with other dealers or because the dealer whose franchise was not renewed refused to deal solely in the products of the automobile manufacturer, does not amount to a violation of the Sherman Act. See for example:

Packard Motor Car Company v. The Webster Motor Car Company (D. C. Cir., 1957), 243 F. 2d 418;

Hudson Sales Corporation v. Waldrip (5 Cir., 1954), 211 F. 2d 268, cert. den. 348 U. S. 821;

Feddersen Motors v. Ward (10 Cir., 1950), 180 F. 2d 519;

Riedly v. Hudson Motor Car Co. (W. D. Ky. 1949), 82 F. Supp. 8;

See also, *Boro Hall Corp. v. General Motors Corp.* (2 Cir., 1942), 124 F. 2d 822.

In addition to the automobile dealership cases cited above, there are many other cases to the same effect but involving other products, that is, cases holding that the anti-trust laws were not violated notwithstanding the charge of concerted action resulting in franchise agreements or selling arrangements being interfered with, cancelled, or not renewed. See, for example, the following cases:

Fargo Glass & Paint Co. v. Globe American Corp. (7 Cir., 1953), 201 F. 2d 534; cert. den., 345 U. S. 942;

Nelson Radio & Supply Co., Inc. v. Motorola Inc (5 Cir., 1952), 200 F. 2d 911; cert. den., 345 U. S. 925;

Shotkin v. General Electric Co. (10 Cir., 1948), 171 F. 2d 236;

Brosious v. Pepsi-Cola Co. (3 Cir., 1946), 155 F. 2d 99;

Neumann v. Bastian-Blessing Co. (N. D. Ill. 1946), 71 F. Supp. 803;
Abouaf v. J. D. & A. B. Spreckels Co. (N. D. Cal. 1939), 26 F. Supp. 830;
Arthur v. Kraft-Phenix Cheese Corp. (D. C. Md. 1938; CHESNUT, J.), 26 F. Supp. 824.

Ordinary common sense would seem to support the unanimous view of the judges who have considered the allegations of the amended complaint in the present case. It is difficult to understand how such a transaction as that described in the amended complaint could possibly be a violation of the anti-trust laws. Manufacturers are constantly confronted with a choice of the methods to be used in marketing their own products. It would interfere intolerably with the normal conduct of business to say that one of them may not agree, at the suggestion or request of a dealer, to limit the number of its dealers in a single community even though the result may be the elimination of one or more existing dealerships. As Judge EDGERTON truly observed in the *Packard* case (243 F. 2d 418, at p. 421):

> "To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it."

In summary, the amended complaint clearly discloses that the only thing of which the petitioner really complains is that it is no longer a Hudson dealer. The petitioner feels that its last one-year franchise should have been renewed and, in effect, it is asking this Court to convert such agreement into a perpetual dealership which cannot be terminated by Hudson except at the risk of an antitrust violation. This same situation was dealt with by the Court of Appeals for the Fifth Circuit in *Hudson Sales Corporation v. Waldrip*, 211 F. 2d 268 (cert. den. 348 U. S. 821) in which the court stated (at p. 274):

> "Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown, which it did not, that the defendant had done so only because plaintiff had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products."

Recognizing the essentially private nature of the instant suit, the District Court dismissed the amended complaint without leave to amend, relying upon the numerous cases which have held the private right of action under the anti-trust laws to be merely an aid in the enforcement of the overriding public policy established by such laws and not to be a right to enforce private claims not related to the invasion of such public rights.[10]

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[10] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.* (5 Cir. 1954), 214 F. 2d 891, 893; *Glenn Coal Co. v. Dickinson Fuel Co.* (4 Cir. 1934), 72 F. 2d 885; *Hudson Sales Corp. v. Waldrip* (5 Cir. 1954), 211 F. 2d 268, 273-4, cert. den. 348 U. S. 821 (1954); *Feddersen Motors, Inc. v. Ward* (10 Cir. 1950), 180 F. 2d 519, 522; *Riedley v. Hudson Motor Car Company* (W. D. Ky. 1949), 82 F. Supp. 8, 10; *Arthur v. Kraft-Phenix Cheese Corporation* (D. Md. 1938), 26 F. Supp. 824, 825-6, 828; *Interborough News Co. v. Curtis Publishing Co.* (S. D. N. Y. 1954) 127 F. Supp. 286, 301, aff'd. 225 F. 2d 289 (2d Cir. 1955); *Dublin Distributors, Inc. v. Edward & John Burke, Limited* (S. D. N. Y. 1952), 109 F. Supp. 125, 127-8; *District of Columbia Citizen Pub. Co. v. Merchants & Manufacturers Assn., Inc.* (D. C. D. C. 1949), 83 F. Supp. 994, 997.

CONCLUSION

Petitioner is seeking in this case to extend the anti-trust laws far beyond any scope previously given them by the decisions of this Court or of any of the lower Federal courts. Its contentions have been thoroughly discussed and ably dealt with in the courts below as well as in the *Packard* case recently decided by the Court of Appeals for the District of Columbia previously discussed. The respondents respectfully submit that no useful purpose can be served by granting the writ of certiorari in this case.

Respectfully submitted,

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OCTOBER TERM, 1956

No. [redacted] 214

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1114

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondents, Bankert Hudson Inc. and Martin A. Bankert (hereinafter called "Bankert") in opposition to the petition of Schwing Motor Company, Incorporated (hereinafter called "Schwing") for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 25, 1957.

STATEMENT OF THE FACTS

Schwing's Petition under the caption "Statement of the Case" (pp. 5-16) summarizes the allegations of the Amended Complaint. Such summary is substantially correct.

In addition to the allegations of the Amended Complaint the following facts were considered by the Courts below:

1. During the period of the alleged "virtual" monopoly two other Hudson dealers operated within the Baltimore metropolitan area. The existence of these other dealers was expressly conceded by Petitioner in argument in both of the Courts below and is not now denied by Petitioner.[1]

2. Neither Hudson nor Bankert had a dominant position in the manufacture or sale of automobiles in Baltimore or elsewhere and many dealers for other makes of automobiles were located in all parts of Baltimore and its metropolitan area.

Again Petitioner makes no denial of these self-evident facts,[2] but instead argues (Pet. brief p. 37) that "the Hud-

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[1] In now characterizing such dealers as "inconsequential," located "in the outskirts of the metropolitan area" and "not in competition with Bankert" (Pet. brief p. 49) Petitioner is attempting to move into an area of fact which *is* disputed, which is outside the allegations of the Amended Complaint, and which played no part in the decisions of either Court below.

[2] New car registrations of the industry and of Hudsons for the five years 1950-55 are reported by Ward's 1956 Automotive Year Book, 18th Edition at p. 155, as follows:

Year	*Industry*	*Hudson*
1950	6,326,438	134,219
1951	5,060,903	96,847
1952	4,158,394	78,509
1953	5,738,989	66,797
1954	5,535,464	35,824
1955	7,169,908	43,212

son automobile is a specialized superior product which is quite different from, and well recognized to be different from, other automobiles." These unverified statements of counsel are not only disputed, but irrelevant to the real issue (see pp. 6, 7, ante). It is significant that such supposed facts were not alleged in either the original complaint or the amended complaint and that Petitioner at no time has made any application for leave to make such allegations by further amendment.

ARGUMENT

I. The decision of the Court below is not in conflict with the decision of any Court of Appeals.

The disappointed distributor who has lost his franchise to sell a trade marked article and who seeks relief under the anti-trust laws is not an unfamiliar figure in the federal courts. With but one exception all such actions have been unsuccessful.

In each of the cases cited below it was specifically alleged that there was a conspiracy to restrain interstate trade and commerce which resulted in termination of the dealer's franchise. In each case it was held as a matter of law that there had been no violation of the anti-trust laws. *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. C. Md. 1937); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99 (C.C.A. 3, 1946); *Neumann v. Bastian-Blessing Co.*, 71 F. Supp. 803 (D. C. N. D. Ill., 1946); *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (D. C. W. D. Ky., 1949); *Feddersen Motors, Inc. v. Ward*, 180 F. 2d 519 (C. A. 10, 1950); *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F. 2d 911 (C. A. 5, 1952; cert. den. 345 U. S. 925); *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F. 2d 534 (C. A. 7, 1953; cert. den. 345 U. S. 942); *Hudson Sales Corp. v. Waldrip*, 211

F. 2d 268 (C. A. 5, 1954); cert. den. 348 U. S. 821); *Packard Motor Car Co. v. The Webster Motor Car Co.*, 243 F. 2d 418 (C. A. D. C., 1957).

Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951), is the exception mentioned above, but only to the extent that it represents an instance in which cancellation of a franchise gave rise to a cause of action. The conspiracy upon which this action was based was not to restrain the dealer's trade in General Motors products but, on the contrary, was to control the retail financing of such products throughout the country. *U. S. v. General Motors Corp.*, 121 F. 2d 376 (C.C.A. 7, 1941 cert. den. 314 U. S. 579).

In the instant case the alleged conspiracy was apparently for the purpose of having three Hudson dealers in Baltimore rather than five while in *Packard Motor Car Co. v. Webster Motor Car Co.*, supra, the manufacturer determined to establish a single dealership. That is to say, the alleged conspiracy here was solely concerned with the distribution of the manufacturer's own product in the City of Baltimore. No contention is made that the manufacturer conspired to use its natural control of its own product either to restrain or restrict trade and commerce in competing products or services or to control the sale of other products or services.

The Court of Appeals cases relied upon by Petitioner all involved conspiracies between manufacturers or distributors of competitive products or services to fix prices or to exclude or restrict the business of another competitor. Such authorities are not in conflict with the decision in this case.

II. The decision of the Court below is not in conflict with any decision of this Court.

This Court has consistently held that the anti-trust laws "do not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . ." *United States v. Colgate & Co.*, 250 U. S. 300, 307; 63 L. Ed. 992; 39 S. Ct. 465 (1919); *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U. S. 565, 573; 68 L. Ed. 448; 44 S. Ct. 162 (1924); *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 624; 97 L. Ed. 1277; 73 S. Ct. 872 (1953). While it may be conceded that this right is not absolute, the cases in which its exercise has been condemned have been those in which there has been a combination of competitors or other *per se* violation of law.[3] Even where a price fixing conspiracy has been established the Court has been unwilling to deny this right to the offending manufacturer. *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 728; 88 L. Ed. 1024; 64 S. Ct. 805 (1944).

The decisions relied upon by Petitioner of which *Interstate Circuit Inc. v. United States*, 306 U. S. 208; 83 L. Ed. 610; 59 S. Ct. 467 (1939); *United States v. Crescent Amusement Co.*, 323 U. S. 173; 89 L. Ed. 160; 65 S. Ct. 254 (1944); *Eastern States Retail Lumber Dealers Assn. v. United*

[3] In *Lorain Journal v. United States*, 342 U. S. 143; 96 L. Ed. 162; 72 S. Ct. 181 (1951), and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359; 71 L. Ed. 684; 47 S. Ct. 400 (1927), the refusal to sell was to create or perpetuate a monopoly and in *United States v. Schrader's Son, Inc.*, 252 U. S. 85; 64 L. Ed. 471; 40 S. Ct. 251 (1920); *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707; 88 L. Ed. 1024; 64 S. Ct. 805 (1944); and *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U. S. 441; 66 L. Ed. 307; 42 S. Ct. 150 (1922), the refusal was adopted as a means to fix resale prices.

States, 234 U. S. 600; 58 L. Ed. 1490; 34 S. Ct. 951 (1914), are typical, all involved conspiracies by competitors to exclude or restrict the business of a competing concern. None of these authorities consider the issue of an alleged conspiracy solely between a producer and a distributor of its products for the purpose of changing the number of such distributors. Such cases would be in point if it had been alleged here that Hudson, General Motors and Ford had conspired to restrain Petitioner's business, or if it were alleged that Bankert and other competing dealers had conspired either with or without the joinder of the manufacturers to injure Petitioner.

It is not without significance that the Congress, after extensive hearings, deemed it necessary to create a new remedy in favor of automobile dealers against the manufacturers, in an effort to remedy any injustice which might result from franchise cancellations or failures to renew. Act of August 8, 1956 c. 1038, 70 Stat. 1125, 15 U. S. C. 1222-1225.

Finally Petitioner contends that under the decision of the Court in the Cellophane case, *United States v. duPont & Co.*, 351 U. S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956), the relevant market in this case was the market for Hudson automobiles within the City of Baltimore. This argument ignores the "constant" tests that the Court has announced. "That market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." 351 U. S. 404. "In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control." (351 U. S. 395, 396).

In an attempt to meet these criteria counsel for Petitioner argue that determination of the relevant market is

in all cases an issue of fact and that a Hudson automobile is unique in that it is higher priced, has unspecified safety devices, a specialized type of motor and other undisclosed features. Even these assumptions do not suggest that a Hudson and any other comparably priced automobile are not reasonably interchangeable for the purposes for which they are produced. Indeed, it is a matter of common knowledge that Hudsons have the same use as Buicks, Chryslers, Studebakers and even Cadillacs and Fords.

III. The decision of the Court below does not present an unresolved question of Federal law.

Petitioner's allegations of a "virtual" monopoly which are relied upon as giving rise to a cause of action under Section 2 of the Sherman Act must be tested by the criteria set forth in the Cellophane case, *supra*. In applying such criteria the trial court was entitled to consider the facts alleged and all reasonable inferences to be drawn therefrom. It was not required to operate in a vacuum or shut its eyes to matters of common knowledge. On this issue the applicable legal principles have been authoritatively stated by the Court adversely to Petitioner's contentions.

Although a fair reading of the Amended Complaint shows that the gravamen of Petitioner's charges is the "virtual monopoly" alleged as a violation of Section 2, relief is also sought under Section 1 of the Act. Every court of appeals that has considered the issues raised by the latter theory of recovery has ruled adversely to Petitioner. The Court has denied certiorari in three such cases within the last four years. *Nelson Radio & Supply Co. Inc. v. Motorola Inc., supra; Fargo Glass & Paint Co. v. Globe American Corp., supra; Hudson Sales Corp v. Waldrip, supra*. In each of these cases a distributor whose franchise

was cancelled or not renewed alleged a conspiracy under Sec. 1 of the Sherman Act. In each case it was held as a matter of law that there had been no violation of the anti-trust laws. The decision of the Court below is consistent with all relevant authority.

Reduced to its essentials the Amended Complaint reveals a private controversy which at most charges a common law tort. The key charge against Bankert is that it "induced" Hudson to break the quota contract and to fail to renew the franchise. Such rights as Petitioner may have by virtue of such alleged misconduct were unaffected by the decision of the Court of Appeals. The redress of these alleged wrongs presents no issue of Federal law.

CONCLUSION

For the reasons herein stated these respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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